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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 404

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND J. MARSHALL PEER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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MAURICE H. KAMM,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

Petitioners J. Marshall Peer and W. D. Witter, jointly and severally petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the 7th Circuit entered June 16, 1944, reversing the judgment of the District Court (dismissing the involuntary petition of the respondents to reorganize

Peer Manor Building Corporation) with directions to proceed with the reorganization of said debtor and denying the petition for rehearing, to the end that its judgment may be reversed, with directions to sustain the order of the District Court and to dismiss the proceedings for corporate reorganization.

Statement of the Matter Involved.

On December 5, 1941 the respondents filed a petition to reorganize the Peer Manor Building Corporation under Chapter X of the Bankruptcy Act and alleged that the debtor was a corporation under Chapter X which could be reorganized under that Act. After the approval of the petition and appointment of a Trustee, an appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit and in the opinion rendered on March 26, 1943 (134 F. (2) 839), the order approving the petition and appointing the Trustee was reversed on the ground that the Peer Manor Building Corporation was dissolved in 1934 and was neither a *de jure* nor a *de facto* corporation.

The majority of the court based its decision upon the opinion of this court in *In re Forty One Thirty Six Wilcox Building Corporation* (302 U. S. 120) which held that under Illinois law a corporation dissolved for more than two years could not file a voluntary petition for reorganization. The majority of the court applied the same rule to an involuntary proceeding against a dissolved corporation and overruled its previous decisions to the contrary on the ground that the positive implications of law of the Wilcox case were "at war" with the Circuit Court's former decisions.

Judge Evans dissented and held that it was a *de facto* corporation and could be reorganized as such.

In their petition for a writ of certiorari to this court the respondents urged that the Court of Appeals erred when it failed to consider that under Chapter X "unincorporated companies and associations" are included and argued that the Peer Manor Building Corporation was either a *de facto* corporation or an "unincorporated company". This court denied the writ on June 21, 1943 (320 U. S. 211).

On July 8, 1943, respondents again invoked the jurisdiction of the Bankruptcy Court by a second petition (R. 2-10) which alleged that the Peer Manor Building Corporation was an "unincorporated company" and as such it could be reorganized under Chapter X. Petitioner J. Marshall Peer filed an answer (R. 11-20) denying that the Peer Manor Building Corporation was an unincorporated company and claiming the adjudication on the former appeal as a bar to the new proceedings. Petitioner W. D. Witter filed a motion to dismiss based on the same grounds (R. 22-29). Evidence was taken by the court on the issues thus presented and on November 23, 1943, the court filed its findings of fact and conclusions of law (R. 63-64). The District Court found that the question of jurisdiction was the same question which was involved in the proceedings on the prior appeal, that the evidence did not show that there was any association or unincorporated company which could be adjudicated bankrupt under the Bankruptcy Act and that the issues decided on the former appeal constituted an adjudication of the issues presented by the second petition. Pursuant to such findings and conclusions, the District Court entered its order of September 14, 1943, dismissing the proceedings.

On June 16, 1944, the Court of Appeals reversed the decision of the District Court with directions to proceed with the reorganization of the debtor. Mr. Justice Evans,

who wrote the dissenting opinion on the former appeal holding that the Peer Manor Building Corporation was a *de facto* corporation, now wrote the opinion for the court to the effect that the Peer Manor Building Corporation was an "unincorporated company" which could be reorganized as a corporation under Chapter X, and that the District Court erred when it held to the contrary.

It is sought by the petitioners to review the decision of the Court of Appeals so that its judgment may be reversed and the judgment of the District Court be sustained.

The Questions Presented.

The following questions are presented:

1. Whether petitioning creditors who previously invoked the jurisdiction of the Bankruptcy Court to reorganize a dissolved corporation under Chapter X as a *de facto* corporation and who sought in their petition for rehearing and in the petition for certiorari presented to this court to sustain the jurisdiction below on the ground that the corporation was an "unincorporated company", may, after the adjudication by the Court of Appeals adversely to their contentions (and the denial of certiorari by this court), thereafter again invoke the jurisdiction of the Bankruptcy Court to reorganize the corporation under Chapter X as an unincorporated company?

2. Whether a corporation which was prohibited by the law of Illinois from operating its corporate business when its charter was revoked, and which continued to operate its business as a corporation in defiance of the state law, may be treated as an "unincorporated company" and be reorganized as a corporation under Chapter X, in the absence of any organization or association by the former members thereof to operate the business as an "unincorporated company", and when the property of the dissolved corporation

was managed in its corporate name by one of its former officers and when the only acts relied upon as constituting doing business are the execution of certain instruments by two former officers purporting to act for a corporation in their official capacity as corporate officers many years after the dissolution of the corporation?

3. Does the term "unincorporated companies" of the Bankruptcy Act include an Illinois corporation which had been dissolved more than eight years prior to the filing of a petition against it, where two of the former officers carried on the business in the corporate name and became liable individually under the Illinois law for debts incurred while so operating the business?

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ herein are:

1. The construction of Section 1 (8) of the Bankruptcy Act that there can be an unincorporated company capable of being reorganized under Chapter X without any persons consenting to form such a company and by the mere fact that after the legal dissolution of the corporation, some of its officers continued to act in its corporate name, is in conflict with the construction of this section by the Circuit Court of Appeals of the First Circuit.

2. The question whether a dissolved corporation, which is operated as a corporation in defiance of Illinois law, by two former officers, may be reorganized as a corporation under Chapter X of the Bankruptcy Act, by Involuntary proceedings instituted against it on the theory that it is an "unincorporated company", is an important question of federal law which should be settled by this court. Otherwise, the law will remain uncertain in view of the principle expressed by this court in *Oklahoma Gas Co.* v.

Oklahoma, 273 U. S. 257, *Mumma* v. *Potomac Co.*, 8 Pet. 281, *In Re 4136 Wilcox Bldg. Corporation*, 302 U. S. 120, that upon dissolution, a corporation ceases to exist for any purpose whatsoever.

3. The Circuit Court of Appeals has decided an important question contrary to federal and state law, which if permitted to stand will cause much confusion, in that it has held that after the Court had on a previous appeal ruled that dissolved corporations could not be proceeded against under Chapter X of the Bankruptcy Act because it was neither a *de jure* nor a *de facto* corporation, and after a petition for a Writ of Certiorari which urged that it was an "unincorporated company" had been denied that a second petition for reorganization could be filed by the same parties seeking identical relief.

4. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable local decisions, in that:

(a) An unincorporated company under Illinois law constitutes an unlimited partnership and partnerships are expressly excluded from corporate reorganization under Chapter X.

(b) The Illinois law holds that upon dissolution of a corporation title to the property vests in the former shareholders of the corporation, as tenants in common and tenants in common are regarded as partners with respect to the joint property.

5. The Circuit Court of Appeals has decided the important problem of *res judicata* in conflict with local and federal decisions:

(a) Its holding that the same parties who had previously been defeated in their attempts to reorganize a dissolved corporation under Chapter X may file a new proceeding to reorganize the same dissolved corporation, using as a basis the same claims and seeking the identical relief, is a departure from the ac-

cepted legal principles that all matters which were or might have been litigated cannot be relitigated by the same parties in an action involving the same subject matter and relief sought.

(b) Such a decision if allowed to stand would cause untold confusion.

6. The questions involved are of public interest, in that:

(a) They involve the right of the State of Illinois to control the existence and duration of corporations which it creates and the right to declare the legal consequences flowing from a dissolution of the corporation, and the carrying on of the business by former officers in their capacity of officers and on behalf of the non-existent corporation.

(b) They involve the right of the State of Illinois to declare that there can be no *de facto* corporations and that partnership liability results from an attempt to operate as a corporation where none exists.

(c) They also involve important principles upon which personal and property rights depend. If a dissolved corporation is continued indefinitely for the purpose of enabling a petition in bankruptcy to be filed against it after its complete extinction under state law, on the theory that it is an unincorporated company and this fictional entity can in the meantime acquire and convey property and exercise other corporate powers, a condition of uncertainty will arise as to title to real and personal property in the State of Illinois and doubt will be cast upon every transaction concerning property in which the corporation might have had an interest.

(d) They involve the right of a court to judicially legislate and create an entity where none is recognized by the Illinois law.

(e) They involve a construction of Chapter X and whether it was the intent of Congress to reorganize dissolved corporations whose officers conducted its business in the corporate name in violation of state law.

Prayer for Relief.

WHEREFORE, petitioners, jointly and severally pray that this petition for a writ of certiorari may be granted and that this Court proceed as provided by law and the rules of this Court in such cases, and that upon final hearing, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

MEYER ABRAMS,
HAROLD J. GREEN,
MAURICE H. KAMM,
Counsel for Petitioners.

Chicago, Illinois,
August 24, 1944.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Seventh Circuit Court of Appeals on the previous appeal by the same respondents holding that the Peer Manor Building Corporation was not a legal entity which could be reorganized under Chapter X, is fully reported in 134 F. (2d) 839. The findings and conclusions of the District Court on the second petition to reorganize the debtor under Chapter X appear in this record (R. 63). The opinion of the Seventh Circuit Court of Appeals reversing the order of the District Court dismissing the proceedings for want of jurisdiction on the ground that the Peer Manor Building Corporation was an unincorporated company which could be reorganized under Chapter X, is not yet reported and appears in the record at page 74.

Jurisdiction of This Court.

The decision of the Circuit Court of Appeals reversing the order below with directions to proceed with reorganization of the debtor under Chapter X was decided on June 16, 1944 (R. 74). The petitions for rehearing were denied on July 13, 1944 (R. 115). Jurisdiction of this court is invoked under Judicial Code Section 240 (a), 28 U. S. C. A. Section 347 (a) as amended by the Act of February 13, 1925.

A Statement of the Case.

The Peer Manor Building Corporation, an Illinois corporation, was dissolved on June 18, 1934, by a decree entered in the State Court.

Notwithstanding the dissolution, on July 23, 1936, more than two years after the dissolution, two of the officers in

the name of the corporation, filed a petition under Section 77 B of the Bankruptcy Act, and secured an extension of the time of payment of a first mortgage bond issue which had been signed by the corporation's predecessor in title. In connection with the reorganization and as part of the plan, the same two officers, purporting to act on behalf of an existing *de jure* corporation, executed a chattel mortgage and a trust agreement to safeguard performance of the plan of extension. The operation and management of the apartment hotel, the only property owned by the corporation, was turned over to Petitioner J. Marshall Peer, the secretary of the corporation, at the time of its dissolution. He managed the property, collected the rents, paid bills and each month turned over the net rentals to the Indenture Trustee, together with a monthly report, which was signed in the name of the corporation, by himself as secretary. There were never any shareholders' meetings after 1934. Peer was subjected to no control by any shareholder and never accounted to the stockholders.

Then on December 5, 1941, the extension period having expired, the respondents, first mortgage bondholders, together with the Indenture Trustee, filed a petition seeking to reorganize the property under Chapter X of the Bankruptcy Act, as amended.

The petition was approved, a trustee was appointed, and a plan of reorganization confirmed.

An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. The court reversed the orders of the District Court, and held that an Illinois Corporation dissolved for more than two years could not be proceeded against under Chapter X (134 F. 2d 839). The basis for the decision was the opinion of this court in *In re 4136 Wilcox Bldg. Corp.* (302 U. S. 120) to the effect that under Illinois law a corporation dissolved for more than two

years ceases to exist for the purpose of filing a voluntary petition for reorganization. The language of the Illinois Statute prohibiting suits by or against a corporation dissolved for more than two years, was construed by the majority of the court to be a bar to *involuntary* bankruptcy proceedings against the dissolved corporation. The majority of the court, in order to make clear that involuntary proceedings were, in view of the *Wilcox* case, to be on the same basis as voluntary proceedings, overruled a line of cases in which it had held that creditors could proceed against the dissolved corporation, especially where all the shareholders were before the court.

Mr. Justice Evans filed a dissenting opinion in which he contended that the debtor was a *de facto* corporation, and therefore amenable to the provisions of the Bankruptcy Act.

The majority of the court said that only corporations can be reorganized under Chapter X and that the court had no jurisdiction to proceed "because the alleged debtor was no longer in esse. There was no corporation to be reorganized."

The respondents filed a petition for rehearing and also a petition for Writ of Certiorari, contending that the debtor could be reorganized under Chapter X as an unincorporated company, urging in their petition for a Writ of Certiorari, filed in this court, that the court had disregarded the provision relating to "unincorporated companies and associations."

This court evidently disagreed with this contention when it denied the petition for a Writ of Certiorari on June 21, 1943 (320 U. S. 211).

Within two weeks, on July 8, 1943, the respondents, the same creditors, filed a petition against the Peer Manor Building Corporation, calling it an "unincorporated com-

pany", seeking to resurrect the dead corporation for the purpose of reorganizing it under Chapter X of the Bankruptcy Act.

The District Court, after hearing evidence, found that the Peer Manor Building Corporation was not an unincorporated company, and was not subject to reorganization under Chapter X, and further that the decision on the first appeal (134 Fed. 2d 839) that the Peer Manor Building Corporation could not be proceeded against under Chapter X, constituted a bar to the new proceeding. The District Court therefore ordered the petition for reorganization dismissed (R. 63-64).

Upon appeal, the Circuit Court of Appeals reversed the order of the District Court, held that the debtor could be reorganized under Chapter X, and that the adjudication on the previous appeal did not bar the new action (R. 74).

This new opinion was written by Judge Evans who had so vigorously dissented on the former appeal. Two of the judges who in the first decision had held that the Peer Manor Building Corporation could not be resurrected, now joined with Judge Evans in holding that the Peer Manor Building Corporation could be reorganized as an unincorporated company, thereby nullifying the effect of their own decision and the denial of certiorari by this court.

Specification of Errors To Be Urged.

The Circuit Court of Appeals erred:

1. In overruling the decision of the District Court that the judgment on the previous appeal that the debtor could not be reorganized under Chapter X, constituted an adjudication and a complete bar to the new proceedings instituted by the same persons and it clearly erred when it reversed the order dismissing the proceedings and directed the proceedings to be reinstated.

2. In holding that a corporation which was dissolved by the decree of a State Court and whose officers continued to conduct its corporate business in defiance of the state law and who are made personally liable for their acts under the Illinois law, may, by their illegal acts, create or establish an unincorporated company and thereby become a corporation for reorganization purposes under Chapter X.

3. In disregarding the Illinois law that unincorporated companies are deemed to be unlimited partnerships, and in holding that the debtor as an unincorporated company may be reorganized under Chapter X, which expressly excludes unlimited partnerships from the Act.

4. In holding that a corporation which was dissolved by judicial decree and which is neither a *de jure* nor a *de facto* corporation, constituted an "unincorporated company" although no persons ever associated themselves to organize such a company.

5. In holding that after petitioning creditors who invoked the jurisdiction of a court of Bankruptcy and who obtained an adjudication against the bankrupt, may, within two weeks after the reversal of the adjudication, again invoke the jurisdiction of the Bankruptcy court to obtain another adjudication against the debtor.

6. In disregarding the findings of fact of the District Court which saw and heard the witnesses, and in failing to follow Rule 52 making the findings binding on the reviewing court, unless clearly erroneous.

SUMMARY OF THE ARGUMENT.

I.

THE DECISION ON THE FORMER APPEAL THAT THE PEER MANOR BUILDING CORPORATION COULD NOT BE REORGANIZED UNDER CHAPTER X WAS A COMPLETE BAR TO THIS ACTION.

(a) The defense of *res adjudicata* was properly sustained because there was the identity of parties, subject matter and relief.

(b) The defense of *res adjudicata* is not only applicable to the issues which were raised and decided, but also to all issues that might have been raised.

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT THAT THE PEER MANOR BUILDING CORPORATION WAS NOT AN UNINCORPORATED COMPANY WERE BINDING ON THE COURT OF APPEALS AND IT WAS ITS DUTY TO FOLLOW RULE 52, WHICH IT FAILED TO DO.

III.

AN UNINCORPORATED COMPANY CONSTITUTES A PARTNERSHIP WHOSE MEMBERS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE ILLINOIS LAW, AND SUCH A PARTNERSHIP DOES NOT CONSTITUTE A CORPORATION UNDER CHAPTER X.

(a) Partnerships whose members are individually liable are not corporations under Chapter X.

(b) An unincorporated company is a partnership whose members are jointly and severally liable under the Illinois law.

IV.

A CORPORATION WHICH WAS DISSOLVED BY A JUDICIAL DECREE AND WHICH CONTINUED TO FUNCTION UNDER THE CORPORATE NAME IS NEITHER A DE FACTO CORPORATION NOR AN UNINCORPORATED COMPANY AND THE STATUS OF THE PERSONS WHO CONDUCT ITS AFFAIRS UNDER THE CORPORATE NAME IS THAT OF INDIVIDUALS WHO ARE PERSONALLY LIABLE FOR THEIR ACTS.

(a) Upon the expiration of the two-year period from the dissolution of the corporation, the title vested in the individual stockholders not as members of an unincorporated company but as tenants in common.

(b) A corporation dissolved by decree of court may not conduct its business in the corporate name as an unincorporated company.

(c) Illinois does not recognize the existence of unincorporated companies as legal entities and such companies must be sued in the name of the individuals who compose them.

V.

THE DECISION IS IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT CONSTRUING SECTION 1(8) THAT THERE CAN BE NO UNINCORPORATED COMPANY WITHOUT ANY ACT ON THE PART OF ANY PERSONS TO FORM SUCH A COMPANY.

(a) The two officers of the corporation who continued to execute documents in the corporate name after its dissolution were personally liable for their acts under Section 157.150 of the Illinois Corporation Act, and their illegal acts did not transform the dissolved corporation into a legal unincorporated company.

(b) In the absence of persons associating themselves for the conduct of a business as an association or an unincorporated company, there was no association or unincorporated company as defined in the Bankruptcy Act capable of reorganization under Chapter X.

VI.

PETITIONING CREDITORS HAD BURDEN OF PROVING THERE WAS A CORPORATION WITHIN THE MEANING OF CHAPTER X.

(a) There can be no reorganization proceedings under Chapter X for liquidation purposes only.

(b) When the debtor is without any legal or equitable interest in the property, it is not subject to reorganization under Chapter X.

VII.

THE BANKRUPTCY COURT HAD NO JURISDICTION BECAUSE ALLEGED DEBTOR HAD NO PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER CHAPTER X, AND AS AN ENTITY COULD HOLD NO TITLE UNDER ILLINOIS LAW.

(a) The petitioning creditors had the burden of proof to sustain the jurisdictional requirements under Chapter X which they failed to do as found by the District Court.

(b) There was no proof that the individuals and corporations which were alleged to have associated themselves as members of the unincorporated company ever did become members of an unincorporated company, and the court properly found that the material allegations of the petition were not sustained by the proof.

(c) The findings of the trial court on controverted factual questions were binding and conclusive on the Court of Appeals.

ARGUMENT.

I.

THE DECISION ON THE FORMER APPEAL THAT THE PEER MANOR BUILDING CORPORATION COULD NOT BE REORGANIZED UNDER CHAPTER X WAS A COMPLETE BAR TO THIS ACTION.

On the question whether a dissolved corporation could be reorganized under Chapter X, there was a clash between the "majority" of the court and the "minority". Judge Minton in writing the opinion for the court said (134 F. (2) 839) at page 841:

> "We therefore hold that since the corporation sought to be reorganized on the petition of the creditors had been dissolved for more than seven years before the filing of the petition herein on December 5, 1941, which fact was properly before the court, the court was without jurisdiction of a party to be reorganized and without jurisdiction of a subject for reorganization. * * * The State of Illinois has the power of life and death over its corporations. It says the corporation is dead. We know of no rule of bankruptcy which has the power of resurrection."

The opposite view was expressed by Judge Evans in his dissenting opinion, wherein he said at page 843:

> "Unless the Illinois statute finally and completely seals the existence of the corporation by dissolution, the creditors should not be barred. The Illinois statute, as I read it, does not completely terminate the corporation's existence. The Corporation is not completely dissolved. It is not wholly dead. It lives for some purposes—to perform some affirmative acts, protective of its creditors. It is a *de facto* corporation so far as creditors' attempting to reach its assets is concerned. *Life Assn. of America* v. *Fassett*, 102 Ill. 315.
>
> "It is not so dead as to prevent creditors, seeking

to protect their rights under the Reorganization Act, from reorganizing it and its estate as the legitimate subject of reorganization. In short, it is a *de facto* corporation for a limited purpose."

The majority of the court, however, *did not agree with him and held that the corporation could not be resurrected.*

In their petition for certiorari filed in this court, respondents urged at page 15 under the heading: "The respondent debtor is a corporation within the meaning of Section 1, Subparagraph 8 of the Bankruptcy Act" that under this section the definition "unincorporated companies and associations, and any business conducted by a trustee" includes the Peer Manor Building Corporation. They also urged:

> "In the case at bar the debtor had conducted a business for seven years at least as a corporation after the dissolution proceedings and was continuing to do so; it had held itself out as a corporation: it had acted through a corporate structure, whether authorized or not; its officers, purporting to act for a corporate entity, had physical possession of valuable property, managed it, collected large sums of money therefrom, paid out large operation expenses, interest, and taxes. It is clear that they did not do these acts in their own right as individuals. They purported to hold for a corporate entity. If that entity had ceased to exist, then they must have held in trust for the creditors or the beneficiaries of that entity, or both, and must have operated the business for those beneficiaries."

They further urged (p. 17):

> "The statutory definition does not limit corporations for purposes of voluntary bankruptcy to those constituted corporations under sanction of some state law or relying on the exercise of the power of a state to create or continue a corporate existence, else there would have been no need for the words, 'unincorporated companies and associations and any business conducted by a trustee' in the statute."

After the denial of their petition for certiorari by this court (320 U. S. 211), and the decision of the District Court upon the evidence in the case that the judgment of the Court of Appeals was a complete bar to the new action commenced by the same parties against the same parties seeking the identical relief, Judge Evans now wrote the opinion of the court, wherein he held that Sec. 1 (8) of Title 11, brings the Peer Manor Building Corporation within the act.

The District Court in sustaining the defense of *res judicata* made the following findings:

1. The question of jurisdiction herein involved is the same question as was involved in the proceeding entitled, Peer Manor Building Corporation, a corporation, Debtor, in the United States Circuit Court of Appeals, for the Seventh Circuit, Case No. 8098.
2. The evidence does not show that there is here an association, individuals, or corporation, as are required for parties against whom an involuntary petition may be filed under the Bankruptcy Act.

These findings were based on evidence heard in open court and on the legal principles announced by the Seventh Circuit Court of Appeals in its decision on the previous appeal taken by the respondents when it reversed the District Court which entered a decree for the reorganization of the debtor under Chapter X. The Court of Appeals held (134 F. (2) 839):

> "For another reason the court was without jurisdiction to proceed, because the second essential element was lacking. It could not proceed under Chapter X of the Bankruptcy Act unless it had before it a corporation, as only corporations can be reorganized under this Chapter. This was a jurisdictional fact that did not exist and could not exist because the alleged debtor corporation was no longer in ease. There was no corporation to be reorganized."

Among the evidence tending to sustain the defense of *res judicata* there was introduced in evidence the petition for certiorari which was filed by the respondents in this court when they sought to review the decision of the Court of Appeals. This petition urged, among other things, the following:

> "The Court of Appeals for the Seventh Circuit erred in that it failed to give any consideration to the statute made and provided defining a corporation for the purpose of bankruptcy to include 'unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instruments' ";

This petition was denied by this court on June 21, 1943.

After holding in the previous opinion that the court knew of "no rule of bankruptcy which has the power of resurrection" the respondents *resurrected* the corporation, within one month after the pronouncement of death sentence by the denial of certiorari. The judge who wrote the dissenting opinion on the former appeal (wherein he held that a corporation was not "so dead as to prevent creditors, seeking to protect their rights under the Reorganization Act, from reorganizing it," and that it was "a *de facto* corporation," and *with whom the majority of the court then clashed and held to the contrary*), now wrote the opinion in the instant case reaching the *opposite conclusion* and holding that the corporation was the proper subject of reorganization under Chapter X.

In discussing the question of *res judicata*, the court stated (R. 75) that it was satisfied that the decision on the former appeal was not an adjudication because "the parties were not the same; the evidence was not the same; nor was the issue the same". The court completely overlooked that the defense of *res judicata* is *not* overcome by

the fact (1) that the evidence may be different, nor (2) that the issues may be different. A defense of *res judicata* is sustained when it contains the elements (1) identity of parties, (2) of subject matter, and (3) the relief. (*City of Chicago* v. *Partridge*, 248 Ill. 442.) The *subject matter* on the former appeal was *the reorganization of the debtor*, the Peer Manor Building Corporation. This is the *same subject matter* that is involved on this appeal. The *claim* was based on the *same bonds* which were held by the *same petitioners* on the prior appeal. The same property was sought to be reorganized. There is, therefore: (1) *identity* of the parties, (2) subject matter, and (3) the relief. The fact that additional parties were added is of no importance. (*Goumaris* v. *Pavlakas*, 202 Ill. App. 268.) **The matter was adjudicated between these petitioners and the respondents and may not be relitigated.** A defense of *res judicata* is applicable, not only to the issues that were adjudicated, but all issues that might have been adjudicated. (*Barry* v. *Commonwealth Edison Co.*, 374 Ill. 473; *Skolnik* v. *Petella*, 376 Ill. 500, citing *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.) *Res judicata* applies not only to the matters that were litigated, but to the matters which might have been litigated. (*People ex-rel Modern Woodmen of America* v. *Circuit Court*, 347 Ill. 34.) The law of *res judicata* is not limited to the issues actually involved or determined, but extends to every other matter which might have been raised and decided. (*People ex-rel De Cola* v. *United States Fidelity & Guaranty Co.*, 306 Ill. App. 518; *Bowles* v. *Capitol Packing Co.*, 143 F. (2) 87, 89.)

The identical question was decided in *Reihm* v. *Clough-Reihm Co.*, 234 Ill. App. 199. There a suit in chancery was filed to establish a resulting trust pertaining to certain real estate. The plaintiff failed in his suit and he filed a new suit claiming relief against the same property on a different theory. In deciding that the judgment in

the first case was a bar to the second case, the Appellate Court relied on the decision in *Beloit* v. *Morgan*, 7 Wall, 619 and it quoted the following from a decision of the Supreme Court of Illinois:

> "There was identity of parties and subject-matter in the two suits, and the rule is, that in such a case the question which was in issue and judicially passed upon and determined in the first suit is conclusively settled by the judgment and cannot be again litigated in another action between the same parties. (*Noyes* v. *Kern*, 94 Ill. 521; *Hanna* v. *Read*, 102 Ill. 596; *Wright* v. *Griffey*, 147 Ill. 496; *Louisville, N. A. & C. Ry. Co.* v. *Carson*, 169 Ill. 247; *People* v. *Hill*, 182 Ill. 425.) A complainant must present all the grounds showing his right to the relief prayed for which could have been presented, and if he does not, he will not be allowed in a second suit to take advantage of the omission. All questions relating to the same subject-matter which were open to consideration and could have been presented are conclusively settled, whether they were presented or not. (*Bailey* v. *Bailey*, 115 Ill. 551; *Harmon* v. *Auditor of Public Accounts*, 123 Ill. 122; *Lusk* v. *City of Chicago*, 211 Ill. 183.) The former judgment must be upon the merits, but a judgment on demurrer 'is as conclusive as a judgment from a finding of the facts alleged in the bill.' (*Nicpel* v. *Laparle*, 74 Ill. 306.)"

The court further said:

> "'The general rule is, that where a second action is based upon the same claim and demand as a former suit, the judgment in the former suit, if rendered upon the merits, is an absolute bar to the subsequent action, and as to such claim concludes both parties and privies, not only as to every ground of recovery or defense actually presented, but also as to every ground which might have been presented in the former suit. (*Anderson* v. *West Chicago St. R. Co.*, 200 Ill. 329; *Marie M. E. Church* v. *Trinity M. E. Church*, 253 Ill. 21.)'
>
> "To such an unbroken line of authorities, both in

> the earlier and later cases, this court cannot do otherwise than adhere."

Furthermore, the issue that this was an unincorporated company was made and decided on the former appeal. The petition for rehearing filed in said cause relied on the same statutory provision on which this court now based its opinion (R. 24). In the petition for certiorari which was filed in this court (R. 25), the respondents said (R. 26):

> "The statutory definition does not limit corporations for purposes of involuntary bankruptcy to those constituted corporations under sanction of some state law but refers to **unincorporated companies** and associations."

It is evident that the *identical* issue was raised and adjudicated by the court in the former appeal (134 F. (2) 839). It was adjudicated by this court when it denied certiorari (320 U. S. 211).

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT THAT THE PEER MANOR BUILDING CORPORATION WAS NOT AN UNINCORPORATED COMPANY WERE BINDING ON THE COURT OF APPEALS AND IT WAS ITS DUTY TO FOLLOW RULE 52, WHICH IT FAILED TO DO.

The District Court heard the evidence in open court (R. 29-63). After hearing the oral testimony and examining the exhibits it filed its "Findings of Fact" under Rule 52 (R. 63) that the Peer Manor Building Corporation was "not unincorporated company" or "association". These findings were binding on the Court of Appeals and it was its duty to accept the findings as true under Rule 52 (*Saco-Lowell Shops* v. *Reynolds*, 141 Fed. (2) 587; *Schwarz* v. *Witwer Grocer Co.*, 141 Fed. (2) 341). The Court of Appeals clearly erred when it refused to follow the Rule and reversed the District Court on factual issues which were binding on it.

III.

AN UNINCORPORATED COMPANY CONSTITUTES A PARTNERSHIP WHOSE MEMBERS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE ILLINOIS LAW, AND SUCH A PARTNERSHIP DOES NOT CONSTITUTE A CORPORATION UNDER CHAPTER X.

The conclusion of this court that the debtor, the Peer Manor Building Corporation, was an unincorporated company within Section 1 (8) and 506 (3) of Title 11, is fundamentally wrong because under the Illinois law *unincorporated companies constitute partnerships*, whose members are individually and jointly and personally liable for the debts of the co-partnership, and such a partnership is *excluded* by Chapter X of the Bankruptcy Act. (See *Pope & Cottlle Co.* v. *Fairbanks Realty Co.*, 124 F. (2) 132, 135, construing the meaning of "unincorporated company" under Chapter X.)

(a) Partnerships whose members are individually liable are not corporations under Chapter X.

The opinion (p. 4) quotes Section 1(8) of Title 11, defining corporations under the Bankruptcy Act which includes "partnership associations organized under laws *making the capital subscribed alone responsible for the debts of the association.*" (Emphasis ours.) A partnership whose members are individually liable is, therefore, *excluded* under this section.

(b) An unincorporated company is a partnership whose members are jointly and severally liable under the Illinois law.

If it be true, as the court held, that the Peer Manor Building Corporation is an *unincorporated company*, then it was a *partnership* whose members are jointly and individually liable (*Hodgsen* v. *Baldwin*, 65 Ill. 532, 538) and

therefore it is *not a corporation* within the meaning of Chapter X.

In *Pilsen Brewing Co.* v. *Wallace*, 291 Ill. 59, the court referred to the status of unincorporated companies and the liability of its members. It said (p. 62):

> "If a liability existed it was *not statutory* but arose from a failure to comply with the provisions of another act authorizing changing the names of corporations, which contains no similar provision. If there was a liability it rested upon *the rule of law that when individuals act under a corporate form and in a corporate name when there is, in fact, no corporation,* they have not thereby absolved themselves from personal liability *and are liable as partners.* Independently of section 18, a company which is not a corporate body is a partnership composed of the officers and subscribers to the articles of association. *Bigelow* v. *Gregory*, 73 Ill. 197; *Loverin* v. *McLaughlin*, 161 id. 417; *Ryerson & Son* v. *Shaw*, 277 id. 524."

This applies to an unincorporated company under the Illinois law (*Hunter* v. *Winter*, 268 Ill. App. 487, 491, and cases there cited).

IV.

A CORPORATION WHICH WAS DISSOLVED BY A JUDICIAL DECREE AND WHICH CONTINUED TO FUNCTION UNDER THE CORPORATE NAME IS NEITHER A DE FACTO CORPORATION NOR AN UNINCORPORATED COMPANY AND THE STATUS OF THE PERSONS WHO CONDUCT ITS AFFAIRS UNDER THE CORPORATE NAME IS THAT OF INDIVIDUALS WHO ARE PERSONALLY LIABLE FOR THEIR ACTS.

The opinion asks (p. 6): "If Peer Manor Building were not an 'unincorporated company or association' what was it?" The answer to this question is not determined by the fact that "it carried on business" but by the fact

that "Peer" *carried on business* under the corporate name which the State had prohibited him from using. Therefore, *the answer to the question of the court is that "Peer" was the "Peer Manor Building Corporation."*

On the former appeal (134 Fed. 2d 839), the *dissenting* opinion held that the corporation was a *de facto* corporation. The majority held that it was *not* and its decision is binding on this appeal upon the issue whether or not it was a *de facto* corporation. In fact, neither the petition for reorganization nor the opinion of this court holds that it is a *de facto* corporation. The reason is apparent. *When a corporation is dissolved by a decree of a court, it cannot continue to function as a de facto corporation.* The authorities are collected in 47 A. L. R., p. 1394. There the author says:

> "It has been laid down that 'after a corporation is dissolved by a judicial decree, or by the expiration of the period fixed for its existence in the law under which it is organized, it is not even a *de facto* corporation and its existence as a corporation may be questioned collaterally'."

Many decisions are cited under Note 1 in support of this proposition. The reasoning behind the decision is based on the point that a *de facto* corporation must have its power under *some law* and when the law has prohibited the corporation from continuing its life, it cannot exist as a *de facto* corporation. The reasoning was also adopted by our Illinois courts. (*Robinson* v. *New York Cent. R. Co.*, 283 Ill. 334.) It is evident, therefore, that the Peer Manor Building Corporation did not function as a *de facto* corporation. The "life" of the corporation ended forever and it could not be resurrected for any purpose. (*United States* v. *Safeway Stores*, 140 F. (2) 835, 836.)

(a) Upon the expiration of the two-year period from the dissolution of the corporation, the title vested in the individual stockholders not as members of an unincorporated company but as tenants in common.

Upon the dissolution of the corporation and the expiration of two years thereafter, the title to the corporate property was *not* vested in the Peer Manor Building Corporation as an unincorporated company, as *such a company may not hold title* under the Illinois law. (*Butler Mfg. Co.* v. *Dept. or Finance*, 383 Ill. 220, 228.) The title was vested in the stockholders as tenants in common. (16 Fletcher on Corporations, Permanent Edition, Sec. 8134.) While prior to the expiration of two years from the date of the dissolution, the corporation holds the title as Trustee for the benefit of the creditors and stockholders (*Crocker* v. *Commissioner of Internal Revenue*, 84 Fed. 2d 64), subsequent to the expiration of the two-year period, the stockholders are vested with the fee title, free and clear from the payment of any debts except those that are secured by a lien created prior to the dissolution. (*R. F. C.* v. *Teter*, 117 Fed. (2) 716, 7 C. C. A.)

(b) A corporation dissolved by decree of court may not conduct its business in the corporate name as an unincorporated company.

The petition in the instant case did not allege that the Peer Manor Building Corporation conducted its business as an *unincorporated* company, but on the contrary, it *alleged* (R. 2) that the corporation was dissolved by judicial decree on June 18, 1934 and (R. 3) for a long time thereafter and up to the date of the filing of the petition, the persons named therein *continued to conduct their business* in the *form and style of a "corporation."* It alleged in paragraph 8 that all of the said operations of the said

unincorporated company "were carried on and conducted *through the medium of a corporate form and style.*" The proof was that the corporate functions were performed by the Peer Manor Building Corporation, a corporation, by its President and Secretary and the *corporate seal* was attached (R. 3). It is evident therefrom that the Peer Manor Building Corporation in defiance of the decree of its dissolution and of the law of the state, *continued to conduct its business not as an unincorporated company but as a corporation.* Its status, therefore, was not that of an unincorporated company but of persons who stood in defiance of a state law who are personally liable for their acts.

The question of the status of stockholders of a dissolved corporation under the *prior* Corporation Act was discussed in *Loverin* v. *McLaughlin,* 161 Ill. 417, and there it was held that their liability was that of *partners.* This doctrine was repudiated in *Inter-Ocean Co.* v. *Robertson,* 296 Ill. 292 and the court held that under the Corporation Act, as it then existed, the stockholders were not liable, but *the officers and directors were individually liable.* It said (p. 98):

> "In the absence of an express statute declaring such liability, we hold, in harmony with the great weight of authority, such liability does not exist."

The Corporation Act was *thereafter amended* and instead of making only the directors liable, the new Corporation Act provides (Chapter 32, Sec. 157.150, Smith-Hurd Ill. Ann. Statutes, p. 420) that:

> "All persons who assume to exercise corporate powers without authority so to do shall be jointly and severally liable for all debts or liabilities incurred or arising as a result thereof."

Under this statute, if all of the stockholders conducted the business of the dissolved corporation under its corporate name, *they are jointly and severally liable.* Under no

stretch of the imagination can they be held to be members of an unincorporated company under the Illinois law.

(c) Illinois does not recognize the existence of unincorporated companies as legal entities and such companies must be sued in the name of the individuals who compose them.

At common law an unincorporated association cannot be sued under its unincorporated name, but all its members must be named as defendants. This common law exists in Illinois. No suit against an unincorporated company may be maintained in Illinois (*Moskal* v. *New Era Commercial Ass.*, 228 Ill. App. 278, 280). A suit against an unincorporated company or partnership must, under the Illinois law, be against the individual members of such companies or partnerships (*Cahill* v. *Plumbers, et al.*, 238 Ill. App. 123). *Such a company cannot hold title to realty or personalty* and the title must be in the name of the individual members, unless specially authorized by the statute (*Butler Mfg. Co.* v. *Department of Finance*, 383 Ill. 220, 228). The petition in the instant case did not sue the individuals as doing business in the name of the unincorporated society. On the contrary, it sued the Peer Manor Building Corporation and service was procured upon its registered agent (R. 10). It is true that the petition describes some individuals and corporations as the persons who composed the unincorporated company, but *the petition did not sue these persons as the bankrupts.* If the intent of the petition was to sue the individuals as the bankrupts for corporate reorganization, it would have been necessary as a jurisdictional requirement under Chapter X, Sec. 130 (1) to set forth that each individual was either insolvent or unable to pay his debts. It would have been necessary to set forth under Section 130 (3) the nature of the business of each of

the individuals and under Section 130 (4), the assets and liabilities of each of the persons or corporations who composed the unincorporated company. A glance at the petition will indicate that the proceeding was against the *unincorporated company as a legal entity.* As such, it could not be bankrupt and it could not file a petition to be reorganized nor could a proceeding be filed against it.

V.

THE DECISION IS IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT CONSTRUING SECTION 1(8) THAT THERE CAN BE NO UNINCORPORATED COMPANY WITHOUT SOME ACT ON THE PART OF SOME GROUP OF PERSONS TO FORM SUCH A COMPANY.

The court overlooked the all important fact that after the Peer Manor Building Corporation had been dissolved the former shareholders *in no way united or associated themselves with Peer to form a group or an entity.*

Every case cited by the court clearly shows that in order that a number of persons carrying on a business may be regarded as an association or unincorporated company, these persons must unite into some group and set up some form of organization whereby a few are designated as agents for the group to carry on the business.

It is possible for the shareholders of a dissolved corporation to continue to hold meetings, elect officers, and thereby create an unincorporated company or association, but this is because of new acts by the shareholders showing that they are united for carrying on business.

This was not the situation in the instant case.

The evidence shows that Peer signed the bond issue and constructed the apartment building. When it was finished he gave the contractors whom he could not pay cash, stock

in the corporation which he had organized to take title to the property. This accounts for companies like Midland Terra Cotta and Reliance Elevator being shareholders in Peer Manor Building Corporation. Until there was a default on the bond issue there were corporate meetings, officers elected and the corporate functions carried on. Peer was ousted from control at one time. But after the corporation got into difficulties the shareholders lost hope, and as Peer put it in his testimony, they ran out on him. There were no more meetings. There was never even a meeting of the Board of Directors to authorize the filing of the voluntary petition back in 1936. This was after the dissolution of the corporation.

Nor do we find any such united or concerted action by the shoreholders or any group of them, as would under the authorities cited by the court and the very definition of an association or unincorporated company cited in the opinion, create an association or unincorporated company of the former shareholders of the defunct Peer Manor Building Corporation.

The shareholders never met, never elected officers. After the extension of the bond issue, only Peer operated the property. He did not account to the shareholders. He made reports only to the Indenture Trustee. He conferred with no one other than Nickolas, the largest bondholder, with respect to operation of the property.

The shareholders took no steps whatsoever to bring about an entity.

The evidence produced at the hearing upon the motion to strike negatived the creation of an association by the shareholders through any acts on their part.

The finding of the District Court on this issue was binding and conclusive on the Court of Appeals (*Schwarz* v. *Witwer Grocer Co.*, 141 F. (2) 341, *supra*).

The cases cited by the court are all in which there was a going organization with officers chosen by the members thereof, active participation in the affairs, and clearly show that the basis for the holdings are that a *number* or *group* of individuals carry on business with all the attributes of a corporation.

The Court has created an entity where none existed. Although in parts of the opinion it talks about "it" having continued to do business, and "it" holding property and conducting business, etc., in another part of the opinion the Court says that Peer "speaking for the *corporation* obtained a reorganization" and *"acted as officer and as agent of the corporation and transacted its business in its corporate name."*

Since there was no corporation Peer could not act for one. His holding himself out to act for a *corporation*, when none existed, rendered only Peer personally liable under § 157.150 of the Corporation Act (Chapter 32, Sec. 157.150 Smith-Hurd Ill. Ann. Stat., p. 420, *supra*). None of the other former shareholders had designated Peer to act for them, they had not organized for any purpose of carrying on business—neither the dissolved corporation nor any entity carried on a business of renting apartments.

No act of Peer purported to be the act of an unincorporated company or association, but on the contrary all his acts were on behalf of *Peer Manor Building Corporation.* The word "company" could mean an unincorporated company, but "corporation" negatives the existence of any organization other than one duly organized under a charter from the State creating it.

Under the test laid down by the Court in the *Tide-water Coal Exchange* case, 280 Fed. 638, and cited by the Court in its opinion, the evidence clearly fails to show that there

were here "a number of persons united for performing or carrying on anything jointly."

There was no "it" that had debts, not even a mortgage indebtedness, because the bond issue was signed personally by Peer, and never assumed by the corporation, while it was in existence. The so-called extension and trust agreement purport to be the act of a *dejure corporation of Illinois* and not of an unincorporated association, and does not appear to have been authorized or ratified by the persons who are now, by the Court's opinion, made members of an association. An unincorporated company must be a *voluntary* combination of persons and cannot be created *involuntarily.* (*H. D. Still's Sons* v. *American National Bank,* 209 Fed. 749, 753.) There can be no unincorporated company without the agreement of the persons to become members thereof voluntarily and no involuntary proceeding under Chapter X may be filed against such a company.

In *Pope & Cottle Co.* v. *Fairbanks Realty Trust,* 124 Fed. (2d) 132, an involuntary petition was filed against Fairbanks Realty Trust, describing it as a "voluntary association and an unincorporated company operated by Henry Berish, and Catherine Burns, under a declaration of trust and having a place of business in Brookline, Mass." The court held that the alleged Debtor was not a corporation within the broad definition of the Chandler Act, because it was neither an unincorporated company, association, nor a Mass. Trust. With respect to "unincorporated companies" the court said (page 134):

> "In general the organizations which they (the courts) have held to be subject to involuntary bankruptcy in this category have been unincorporated associations of persons *joining together* at least in part for some common business or commercial purposes and

conducting their affairs somewhat after the pattern of corporations." (Citing cases.)

"In the category of 'unincorporated company' the courts have put some associations organized under a declaration of trust in which the interest of the shareholders were evidenced by transferable certificates similar to shares of stock in a corporation, and which *managed* their affairs not unlike the way corporations are run." (Citing cases.)

The court said that the trust did not come within the broad definition of a "corporation" under the Chandler Act because since the liability as between the trustee and the public was not limited the trust was not a "body" having any of the powers and privileges of private corporations not possessed by individuals or partners." It was not a Mass. trust because the certificates were not transferable. Finally, the court said:

"It is not an unincorporated company within any of the cases, for the beneficiaries have not *associated themselves together* for the conduct of a business with powers similar to those of stockholders as was the case in *Re: Associated Trust,* 222 Fed. 1012, and in *Re: Sargent Lumber Co.,* 287 Fed. 154. It is no more a 'company' than an ordinary trust having two or more beneficiaries. * * * Nor do we think it is an 'association' within the meaning of Sect. 1 (8)."

"We doubt very much whether the words 'and associations' add anything to the words 'unincorporated companies' used in the same phrase. The two beneficiaries have not associated themselves together in the ordinary sense. And it can hardly have been intended that the two trustees should be regarded as an association."

In the case at bar, the holding that under the facts there was an association or unincorporated company by virtue of the fact that from 1936 to 1941 one former officer Peer, unchosen by the former shareholders, operated the prop-

erty without advice, cooperation or concerted action from such shareholders is not only a misconstruction of the Bankruptcy Act, but is at variance with all the decided cases holding that voluntary united or concerted action for the purpose of carrying on a business is a requirement to the creation of an unincorporated company or association.

The petitioners in the instant case *failed to prove that the former shareholders carried on business as an unincorporated company.* They alleged that after dissolution the business was continued in the *form* and style of a corporation, and that the operations of the alleged unincorporated company "were carried on and conducted *through the medium of a corporate form and style.*" The proof was that corporate functions were performed by two officers who in defiance of the Illinois law, acted as a corporation.

The evidence showed no participation by any shareholders of the dissolved corporation in the operation of the property for more than 6 years after the dissolution. The opinion of the Circuit Court of Appeals admits that the management was turned over to Peer, who acted for the corporation and in its name. The evidence shows he managed without interference and control from any other shareholders and that at the time the present petition for reorganization was filed even he had had nothing to do with the property for almost two years, the possession having been in a federal trustee whose appointment was on the prior appeal held void.

Under this state of facts only Peer individually became liable in the absence of evidence that after the dissolution the other shareholders had designated him to act as their agent.

Even had the shareholders participated with Peer in the management of the corporation, in the absence of such

united action and the creation of a governing group as might render them an association, they would, under the present Illinois law, be liable as *partners.*

The provisions of Chapter X cited by the court show that partnerships whose members are individually liable are excluded from the section and that only where the "partnership associations" are "organized under laws making the capital subscribed alone responsible for the debts of the association," may they be proceeded against as "corporations."

In 8 C. J. S. (page 511) the author says:

> "The meaning of the word 'unincorporated' in the Bankruptcy Act 4 b (11 U. S. C. A. 21 (b)), providing that an 'unincorporated' company may be adjudged an involuntary bankrupt, is clear, but the meaning of the word 'company' is much less definite, since the Bankruptcy Act does not define an unincorporated company. It would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common rights *inter se,* but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations." (*In re Associated Trust,* (D. C. Mass.) 222 F. 1012.)

In *Burkhardt* v. *German-American Bank,* (D. C. Ohio) 137 F. 958, 960 the Court said:

> "It is difficult to conceive of an unincorporated company (as distinguished from a corporation and an ordinary partnership) without any of the powers and privileges of a private corporation, for without any of these privileges and powers it would be an ordinary partnership. It is generally understood to be a body or association occupying middle ground between partnerships and stock corporations, possessing some of the

power and privileges of both, and it is generally so recognized by the courts."

It is obvious that there was no association or company after the dissolution. The "it" which carried on business in the name of "Peer Manor Building Corporation" was Peer alone. He alone became personally liable. He obviously cannot be regarded as a corporation. McHugh did not act in concert with Peer in operating a business. Nor did any of the other shareholders. But even if they had they would have been jointly and severally liable as partners without any limitation as to liability and be excluded by the very definition of Chapter X.

The absence of limited liability was a determining factor in the court's conclusion in the *Fairbanks* case that the trust did not come within the broad meaning of a "corporation" as defined by Chapter X including unincorporated companies or associations if the bodies have "any of the privileges of private corporations not possessed by individuals or partnerships." The *Fairbanks* decision is in conflict with the decision in the instant case.

VI.

PETITIONING CREDITORS HAD THE BURDEN OF PROVING THAT THERE WAS A CORPORATION WITHIN THE MEANING OF CHAPTER X.

In order to sustain the right of petitioning creditors to institute involuntary reorganization proceedings against the dissolved Peer Manor Building Corporation, it was necessary for the petitioning creditors to prove all of the allegations of their petition and to prove that the Peer Manor Building Corporation, having been dissolved in 1934, was still a "corporation" within the meaning of Chapter X.

The District Court had held that the evidence did not

show there was not such an association or corporation amenable to being sued under Chapter X of the Bankruptcy Act. This finding could only have been disturbed on review "if clearly erroneous."

The Circuit Court of Appeals said that under the evidence the dissolved corporation was an "unincorporated company or association" within the definition of Chapter X. The pertinent section reads as follows:

> "'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument; * * *." (Title 11, Sec. 1(8) U. S. Code.)

That a dissolved corporation is incapable of acting in any capacity is well settled by the authorities. It cannot even appear by an attorney. Such attempted appearance would be a nullity. (*In re Wilcox Building Corporation*, 302 U. S. 120; *In re Peer Manor Building Corporation*, 134 Fed. 2d 839.)

A corporation of Illinois dissolved for more than two years is incapable of transacting any business whatsoever in its corporate capacity. A carrying on of business under the corporate name after dissolution does not create a corporation.

Two years after the entry of the decree of dissolution all corporate powers of Peer Manor Building Corporation were extinguished by force of the Illinois statute and it ceased to exist as a legal entity. No action could thereafter

be commenced by or against it and it was incapable of performing any corporate acts. (*Markus* v. *C. T. & T. Co.*, 273 Ill. 557; *Sarelas* v. *McCue*, 291 Ill. App. 540; *R. F. C.* v. *Teter*, 117 Fed. (2) 716 (1941).)

In *A. J. Bates* v. *United States*, 3 Fed. Supp. 245 at 248 the court said:

> "The period of limitation within which suit by creditors could be instituted against the Illinois corporation, its officers or stockholders, for any liabilities incurred previous to its dissolution, expired on February 10, 1923. From and after that date the Illinois corporation was extinct for all purposes. It was as nonexistent as if it had never been created, had no stockholders or officers, and was incapable of transacting any business whatsoever."

In *Chas. A. Zahn Co.* v. *United States* (6 Fed. Supp. 317, at 319), the court said:

> "Two years after the dissolution of the corporation, or on March 30, 1923, the Charles A. Zahn Company ceased to exist, and became incapable of transacting any business whatever in its corporate capacity. *A. J. Bates Co.* v. *United States* (Ct. Cl.) 3 F. Supp. 245. This suit filed more than six years thereafter, on May 10, 1929, cannot be maintained."

By the settled rule of this court dissolution under a state statute completely terminates corporate existence. Thereafter, federal courts will not recognize the dissolved corporation as an entity capable of engaging in litigation or otherwise exercising corporate powers. *Mumma* v. *The Potomac Co.*, 8 Pet. 281, 286; *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257.

This court decided in *In Re 4136 Wilcox Building Corporation*, 302 U. S. 120, that an Illinois corporation dissolved for more than 2 years could not institute voluntary re-

organization proceedings and followed the rule laid down by its former decisions that only a state can determine what entities it will recognize.

The same Circuit Court whose decision is here sought to be reviewed had made this rule applicable to an *involuntary* petition for reorganization filed under Chapter X against the dissolved Peer Manor Building Corporation, and had said:

> "The purported appearance and answer of the former corporation by the attorneys were a nullity. The corporation had been dead for 7 years, and was incapable of appointing attorneys or *exercising any other corporate functions.*" (134 Fed. 2d 839.)

All acts relied upon as creating an unincorporated company or association purported to be acts of a *dejure corporation,* were *nullities,* and cannot form the basis for a holding that a company or association was brought about. Void acts can create no legal consequences. Officers who purport to act for a *dejure* company negative an intention to bring about an association or unincorporated company.

The opinion of the Circuit Court of Appeals, however, gives effect to such null and void corporate acts and *creates* a corporation. In an indirect manner, the dissenting opinion in the first Peer Manor case is now given full recognition, and the former opinion which is the law in the case was not followed.

The decision of the Circuit Court of Appeals, by creating an unincorporated company of the shareholders, ignores the effect of the dissolution, and creates an entity in defiance of the law of the State of Illinois, and contrary to the constitutional principle laid down by this court in *Hopkins Federal Savings & Loan Association* v. *Cleary,* 296 U. S. 337.

VII.

THE BANKRUPTCY COURT HAD NO JURISDICTION BECAUSE THE ALLEGED DEBTOR HAD NO PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER CHAPTER X, AND AS AN ENTITY COULD HOLD NO TITLE UNDER ILLINOIS LAW.

It is important to bear in mind that the present proceeding was not an involuntary petition to have the respondent declared a bankrupt but one under Chapter X, which is intended to reorganize and rehabilitate a debtor by permitting it to retain the property through a plan of arrangement or readjustment of its obligations. The petition of the creditors is for reorganization of a "Debtor" not to obtain an adjudication in bankruptcy nor is it to obtain a liquidation and there can be no reorganization proceeding under Chapter X unless the debtor may be reorganized as a going concern (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608).

The jurisdiction conferred upon the bankruptcy court by Chapter X, would be futile unless the debtor were possessed of property upon which the elaborate machinery of administration and reorganization provided for by that Chapter could operate. It is essential, therefore, to the exercise of jurisdiction under Chapter X that the debtor have a property interest which can be the subject of reorganization.

There was no intent on the part of Congress "throwing back into the bankruptcy proceedings property which was once owned by the bankrupt and as to which his ownership and interest has been extinguished" by the law of the State (*State Bank* v. *Brown*, 317 U. S. 135, 138).

In determining whether the debtor has property and the nature and extent of that property, resort must be had to the law of Illinois. *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 10.

Upon the expiration of the two year period after dissolution, the Peer Manor Building Corporation became wholly incapable of owning, conveying, or otherwise dealing with the legal title which it formerly had.

By the rule prevailing in Illinois, this title then vested, *by operation of law* in the Peer Manor Bldg. Corporation's stockholders, subject to the rights of those creditors who had commenced suit within the time prescribed by the Corporation Act. *Gulf Lines R. R.* v. *Golconda Ry.*, 290 Ill. 384, 392; *RFC* v. *Teter*, 117 F. (2) 716.

The complete title could not be conveyed except by deed executed by the individual stockholders and their spouses, if any, although each shareholder might convey his interest by deed of conveyance joined in by his spouse it appears that Alice Page, who is alleged to have an interest but who is not alleged to have been a former shareholder constituting one of the members of the unincorporated company, acquired her interest in this manner.

Chapter X contemplates that a debtor be an entity capable of holding title that will pass to a trustee (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608, *supra*).

At the time of the filing of the petition, the Peer Manor Building Corporation, having been dissolved for more than seven years, was powerless to make a conveyance, and had no property which was capable of being levied upon. Title was in the individual stockholders and not in an entity created by the stockholders through joint action. Under the Illinois law an unincorporated association cannot hold title. In *Butler Mfg. Co.* v. *Dept. of Finance*, 383 Ill. 220, the court said:

> "We recognize the general rule that an unincorporated association does not have legal existence, independent of the members who compose it, which will permit it to take title to personal property in its own name, but the right of such association to take title

to property in its own name may be authorized by statute. (7 C. J. S. 38.)''

The petition for reorganization in the instant case is against Peer Manor Building Corporation, an unincorporated company. It names the shareholders of the dissolved corporation as the unincorporated company, but it does not sue them as individuals doing business in the name of the unincorporated company. The involuntary petition must fail because there is no such entity as Peer Manor Building Corporation, capable of holding title as an unincorporated company.

The decision of the Court of Appeals, disregarding the Illinois law, creates an entity, an unincorporated company, with the power to acquire and dispose of property which can be reorganized under the bankruptcy law and which enables it to manage and administer that property.

According to the Court of Appeals, respondent, Peer Manor Building Corporation, is an existing ''corporation'' within the meaning of Chapter X, having all powers which a corporation must have for reorganization purposes under said chapter.

Notwithstanding this, it is certainly true that under the State law, the Peer Manor Bldg. Corp. has no corporate existence, has no property capable of administration, purchase or sale, has no power to acquire such property; and is immune from capital stock taxes, franchise fees, and all of the other obligations imposed by the State of Illinois upon corporations which it creates. Such a situation is anomalous in the extreme. If there is corporate existence to permit administration of affairs under the Bankruptcy Act, there must be corporate existence sufficient, for example, to enable the State of Illinois to collect taxes from it. Yet, we submit the State of Illinois would have considerable difficulty in collecting taxes from a corporation which in its view and under its law was no longer existent.

The situation created by the decision sought to be reviewed is intolerable from another viewpoint. A creditor not having a lien created by mortgage, would have no right whatsoever to proceed in the Illinois courts against the Peer Manor Building Corporation or the property owned by it prior to its dissolution. Yet, if the same creditor elects at any time to pursue his remedy in the Bankruptcy Court jurisdiction is held to exist. The ultimate effect of the opinion of the Court of Appeals herein is to confer perpetual life upon Illinois Corporations. In every case after a corporation is dissolved some former officer continues to manage the property as Peer did in the instant case. Unless the shareholders unite and take joint action to carry on business for profit and attempt to limit their personal liability no unincorporated company or association is created. But the Court of Appeals has by its decision said that if after dissolution the dissolved corporation is alleged in the petition to be an unincorporated company, then even if the evidence shows only one or two former officers carrying on business in a corporate name without authority from the other stockholders, the dissolved corporation exists, apparently without limit in time, for the purpose of being proceeded against under Chapter X of the Bankruptcy Act.

To permit the decision to stand would create chaos to real estate titles in Illinois wherever title to the property had been held by a corporation since dissolved; for even after a lapse of 9 years from the date of dissolution, any person who had acquired title from a stockholder of the corporation would run the risk of losing it to a trustee in bankruptcy appointed in a proceeding filed against the dissolved corporation on the theory that it was an unincorporated company or association, just as Anna Page, a transferee from a stockholder runs the risk of losing her interest in the property under the liquidation plan pro-

posed by petitioning creditors. Even the petition for corporate reorganization alleged that Alice M. Page had on interest (R. 3). How could her interest be divested by the corporate reorganization? The spouse of a deceased stockholder would suddenly find herself losing her dower interest and the heirs deprived of their rights. All titles acquired by reason of the dissolution of a corporation by a decree of an Illinois court would be unmerchantable.

Moreover, the decision, if permitted to stand would deprive persons of their property without due process in violation of the 5th Amendment to the Constitution of the United States. The spouses of deceased stockholders of the Peer Manor Building Corporation have dower rights in the interest of the deceased stockholders acquired by them in the real property, upon dissolution of the corporation. Likewise the wife of any stockholder who divorced a stockholder for his fault has rights in the property. They are not before the court. They can by no stretch of the imagination be deemed associates or members of an unincorporated company. Yet by the so-called plan of reorganization approved by petitioning creditors who hold more than 60% of the first mortgage bonds, these spouses would be deprived of their rights and interest in the property.

It is important to bear in mind that the denial of relief in a Bankruptcy Court would not deprive the petitioning creditors of their rights. They hold first mortgage bonds secured by a trust deed constituting a first lien upon the property. Foreclosure proceedings are pending in the State court to foreclosure the lien of the trust deed, instituted by the Indenture Trustee for the protection of all bondholders and a receiver appointed in those proceedings was collecting the rents (R. 19). There was no allegation nor proof showing why the prior proceedings would not afford the relief, which is a jurisdictional requirement (*Marine Properties* v. *Trust Co.*, 317 U. S. 78, 84). There

was available for the secured creditors the appropriate relief in the State Court and the petition was not filed in good faith (*Fidelity Ins. Ass.* v. *Sims*, 318 U. S. 608, *supra*). The District Court properly dismissed the proceedings and the Court of Appeals clearly erred in reversing its dismissal order.

Conclusion.

We have shown that the Peer Manor Building Corporation was neither a *de facto* corporation nor an unincorporated company under the Illinois law, and that the District Court had no jurisdiction of the reorganization proceedings. We have also shown that the judgment of this court on the former appeal between the same parties was a bar to this action. It follows that the District Court properly dismissed the petition in sustaining the defense and that the Seventh Circuit erred when it reversed its order.

For the foregoing reason, we submit that the prayer in the petition for the issuance of a writ should be granted.

Respectfully submitted,

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Chicago, Illinois,
August 24, 1944.

(30)

SEP 19 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 404

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

W. D. WITTER AND J. MARSHALL PEER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC.,
AND HARRY FOOTE, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

STATEMENT OF THE FACTS.

Certain inaccuracies and incomplete statements appear in the Statement of the Case included in petitoner's brief, as follows:

On pages 9 and 10 of petitioner's brief, it is stated that a petition was filed on July 23, 1936 by two of

the officers in the name of Peer Manor Building Corporation. The record shows that this petition was filed by the authorization of the Board of Directors (Tr. 55).

On page 10 of petitioner's brief, it is stated that "The operation and management of the apartment hotel, the only property owned by the corporation, was turned over to petitioner J. Marshall Peer, the secretary of the corporation, at the time of its dissolution." This statement is not supported by the record. That the corporation was dissolved June 18, 1934 is admitted by the petitioner Peer's answer (Tr. 11) and petitioner Witter's motion to strike (Tr. 33). The property of the corporation at the time of its dissolution was being managed by the Heitman Trust Company, First Mortgage Indenture Trustee in possession, and had been so managed since early in 1933 (Tr. 30). The indenture trustee continued this management until it was removed by the court in the bankruptcy proceeding August 1, 1936 by an order restoring the "debtor" to possession, and on August 20, 1936 a meeting of creditor and *stockholders* was called and the "debtor" was permanently continued in possession of its assets. (See Pet. Ex. No. 1, pp. 6 and 7: This exhibit, which is the record of the case on appeal which was filed against the corporate entity, is not included in the printed transcript, but was certified as an exhibit to this court by the Circuit Court of Appeals). More than 75 per cent of the stockholders actively joined in the plan that was confirmed by the District Court December 2, 1936 (Pet. Ex. No. 1, page 8).

That all the shareholders joined in a trust agreement dated April 27, 1937 was alleged in the request for admissions (Pet. Ex. No. 1 page 37) and was admitted by petitioner Witter (Pet. Ex. No. 1, page 43,

Par. 8). This agreement provided for the management by the company and the deposit of notes and rents after operation with the indenture trustee who was to pay costs, taxes and interest and to operate a sinking fund for the reirtement of bonds (Pet. Ex. 5, Tr. 32, 39). This trust agreement was approved as a part of the plan (Pet. Ex. No. 1, page 13).

The record does not support the statement on page 10 of petitioner's brief that there was never any shareholders' meetings after 1934. The court record shows a meeting of shareholders called for August 20, 1936, (Pet. Ex. No. 1, pages 6 and 7).

The record does not support the statement on page 10 of petitioner's brief that a final reorganization was confirmed on the petition filed December 5, 1941.

The statement on page 12 of petitioner's brief that the decision of the Circuit Court of Appeals in this case "nullifying the effect of their own decision and the denial of certiorari of this court," is not correct, but this is perhaps a question of law to be dealt with under argument.

ARGUMENT.

I.

The decision on the former appeal was not a bar to this action.

The District Court based its decision denying approval of the petition filed in this case on the theory that the matter was *res adjudicata* by the decision of the Circuit Court of Appeals in the former case. The court said that he was including the finding that there was

not a corporation which the Bankruptcy Act gives jurisdiction of to the District Court "so you can have both questions up" (Tr. 63). The record shows that the counsel was offering to furnish the court with authority on the latter question to the contrary, but that the court refused to consider such authority (Tr. 63).

The Circuit Court of Appeals correctly reversed both findings of the District Court.

To have *res adjudicata* or estoppel by judgment there must be present at least two indispensable elements: 1. Identity of parties. 2. Identity of issues.

> "Where the former adjudication is relied upon as an absolute bar, there must be as between the two actions, identity of parties, of subject matter and cause of action."
>
> *Leopold, et al.* v. *City of Chicago,* 150 Ill. 568, 573.

See also *People* v. *Locklin,* 273 Ill. 106, 108.

In *Troxell* v. *Delaware L.&W.R. Co.,* 227 U.S. 434, 33 S. Ct. 274, 277, this court said:

> "Furthermore it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions."

That case holds that where a suit is on the same cause of action estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy, but where the second suit is upon a different claim or demand the prior judgment bars as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

In that case this court held that a suit by a widow on behalf of herself and children for damages for the

death of her husband was not a bar to a suit by her under Federal Employers Liability Act, as administratrix of her husband's estate. The widow in her individual capacity and the same woman as administratix did not satisfy the requirements of identity of parties.

In its first decision the Circuit Court of Appeals had before it a petition against an alleged Illinois corporation (Pet. Ex. No. 1, page 17). Service was sought against a corporate entity thought to exist under Illinois law. That was the only party respondent to the petition filed in that case. If the corporation was extinct for all purposes then there was no entity to proceed against and no process had been sought issued against or served on an existing legal person. The alleged person (*i.e.* "an Illinois corporation") sought to be served was not *in esse,* hence the jurisdiction of the District Court would fail because there was no party before the court with whom issue could be joined, and upon whom the jurisdiction conferred by the bankruptcy act could operate. There was no corporate entity for the court to reorganize; and *that is precisely what the Court of Appeals said,* 134 Fed. (2d) 840.

> *"Since the court had no other party before it* and could not subpoena a defunct corporation, it was without jurisdiction to proceed." (Italics ours.)

Petitioners say that we have the same parties petitioner here as in the previous case. Granted that we have some of them, this is not enough. The fact that John Jones in *Jones* v. *Smith* is the identical John Jones who is now suing William Robinson in another case would not afford grounds for estoppel by judgment in the former suit to be pleaded in the latter, even if the issues and subject matter are the same. The fact that

there was a judgment for the defendant in a case where Jones sued William Smith as the maker of a note would be no bar to an issue on the same note against Henry Smith who did make the note.

Identity of parties means identity of parties on both sides of an issue, not merely identity of one party. It is clear that the Court of Appeals held that there was no party respondent before the District Court in the former case; since this was true there could be no identity of parties in this suit for there is no party in the first suit to be identified.

The second element necessary to *res adjudicata* is also lacking in this case, identity of issues. The issues involved in the prior case were, (1) Whether there was a pending case within the meaning of Section 127 of Chapter X of the Bankruptcy Act, in which suit a creditor's petition could be filed under that section, (2) Whether a creditor's petition filed under Section 127 of Chapter X of the Bankruptcy Act would lie against an Illinois corporation whose charter had been revoked for more than two years. The opinion of the Court of Appeals in the former case answered both questions in the negative. There was, however, no unanimity between the three judges except as to result and the later opinion indicates that that unanimity was based on the question of whether there was a pending case. The answer to that question in the negative completely disposes of the case and nothing further was necessary to require a mandate for dismissal. In any event the court did not discuss, and did not have before it on the pleadings, and did not pass on the question of whether the business herein involved was being conducted as an unincorporated company or association

which could be subjected by an original creditor's petition to the jurisdiction of the bankruptcy court under the definition of a corporation as provided by the bankruptcy act for its own purpose, which is the only issue in the case at bar; nor could have this issue been properly presented on the pleadings because the court had not before it any pleadings filed and had no process issued against or even purporting to be filed or issued against an unincorporated company or association. Ergo it follows, that the issues involved in this case could be neither properly presented nor properly determined.

It is true we did present on motion for rehearing to the Appellate Court and with our petition for certiorari in this court briefs wherein we sought to raise those issues, but both courts ignored those portions of our briefs, and not one word was said by the court's opinion on the subject. We have upon reflection concluded that the court was justified in disregarding these issues for the reason that there was no record before the court on which the court could determine the issues sought to be raised. It therefore follows that the proceeding is lacking in the second indispensable element of *res adjudicata,* that is identity of issues. There is no conflict whatsoever between the decision of the Appellate Court in the former case and its decision in this case. None of the cases cited by petitioners supports their contention, and none of those decisions in any way conflct with what we have hereinabove asserted to be the rules of law applicable. The sole action of this court in the former case was to deny the petition for certiorari. It is well established that a denial of a petition for certiroari is not an adjudication on the merits on any issue in the case.

II.

Findings of fact by the District Court sitting in bankruptcy are not binding on a reviewing tribunal.

The Circuit Court of Appeals derives its jurisdiction in a bankruptcy proceeding and in controversies arising in bankruptcy from Sections 24 and 25 of the Bankruptcy Act itself, Sections 47 and 48, Title 11, U.S.C.A., and that statute describes the scope of the jurisdiction of the Circuit Court of Appeals "to review, affirm, revise, or reverse, both in matters of law and in *matters of fact.*" This statute takes bankruptcy proceedings and controversies out of the general rule referred to as Rule 52 in petitioner's brief herein. The statutes makes it clear that jurisdiction is conferred upon the Circuit Court of Appeals to review, reverse and revise judgments of the District Court in questions of fact, as well as in questions of law.

III.

The question of whether an unincorporated company constitutes an entity or whether it constitutes a partnership whose members are jointly and severally liable under the Illinois law is not determinative of the jurisdiction of a bankruptcy court.

The Constitution of the United States, Article I, Section 8, confers on the Congress the power "To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States." This provision of the Constitution is the source of the authority of the Congress to enact all bankruptcy legislation. The grant of power is

limited to the enactment of "uniform" laws throughout the United States. Congress exercising this power enacted Section 106 of Chapter X (Title 11, Section 506, U.S.C.A.) which so far as here pertinent reads: " 'Corporation' shall mean a corporation, as defined in this Title, which could be adjudged a bankrupt under this Title."

The definition thus incorporated in Chapter X by this reference is found in Chapter 1 of the same title Section 1 (8); Title 11, Section 1 (8), U.S.C.A.

> " 'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

It is obvious the Congress intended by this statute to extend the scope of bankruptcy jurisdiction far beyond that of legal corporate entities operating under charters. Petitioner's contention is that the law of Illinois does not recognize unincorporated companies as legal entities but by legislative fiat makes each of the participants therein liable individually as partners.

Whether this be true or not is a matter of no import. The Congress by enacting the statute quoted above set up its own definition of a corporation for the purpose of bankruptcy. That definition was established pursuant to a constitutional grant of power. It, therefore, is the supreme law of the land, and if there were a conflict

between this definition and that of the statutes of the State of Illinois the state statutes would give way to the bankruptcy statutes. However, there is no conflict involved. The bankruptcy statute does not purport to define a corporation for the purpose of operation of the state laws, nor does the state statute, cited by petitioners, purport to define a corporation for the purpose of bankruptcy jurisdiction. The conflict is imagined and not real, and the cases cited under petitioner's heading III are therefore not applicable to any issue herein involved, and the same thing is true of the citations appearing in Subdivision (c) of IV in petitioner's brief, pages 29-30.

IV.

The question of the status of the entity created by a state charter more than two years after dissolution in Illinois is not an issue which presents itelf in this case.

On pages 25 to 30 of petitioner's brief, attention is paid to the question of what is the status of the corporation created under Illinois law more than two years after its dissolution by a court in Illinois and discussion is had as to whether it is a *de facto* corporation. It was contended in the prior case that the corporation was not nonexistent for all purposes, and that where there were creditors an involuntary petition in bankruptcy would lie against such corporation even though the period of its capacity to sue or to be sued under the state statute had expired. The majority opinion of the Circuit Court of Apepals in the prior case said that such corporation was dead for all purposes. It based that conclusion on the case of *4136 Wilcox Building Corporation,* 302 U. S. 120, 58 Sup. Ct. 125. Whether this

opinion correctly expressed the law or not, the *Wilcox* case does not furnish the authority because this court in the *Wilcox* case expressly refrained from ruling on the question of whether an involuntary petition could lie against such corporation in a bankruptcy court, and it is not even clear that the ruling just referred to was even the majority view of the Circuit Court of Appeals, inasmuch as the concurring judge concurred in the result only. However, this issue is not involved in the case at bar.

There is no question here as to the continuity of an entity deriving its existence from the state after its dissolution by the state of its creation. This case rests upon what the parties did after the dissolution and their conduct of the business after the dissolution. Petitioners are mistaken in their contention that the Circuit Court of Appeals in this matter resurrected a corporation after its demise or attempted to do so. Whatever may have happened with respect to the old corporation, the acts of the parties manifested that there was being operated an unincorporated company. It may well be, as petitioners contend, that where stockholders of a company continue to conduct a business after a corporate existence has been terminated by the state, that such conduct is contrary to the state law, and it also may well be that by statutory provision the participants are personally liable. The legal effect in that respect does not alter the factual situation that a group of people were jointly conducting a business for their common purpose, and that this group had and was using property, engaging in transactions, incurring and discharging indebtedness, acknowledging obligations under the first mortgage, accepting same and paying interest thereon, and as such would and did constitute

an unincorporated company within the meaning of the Bankruptcy Act, whether or not there was an entity which could be sued in the courts of Illinois, which courts were without the aid of the statutory definition of a corporation for the purposes of bankruptcy. The petition in this case is against the Peer Manor Building Corporation, an unincorporated company. The petition described the individuals and corporations participating in this enterprise and thereby constituting an unincorporated company. Whether or not it named all the persons that participated, or named more persons than participated, has not been joined as an issue below, and is therefore not properly before this court.

V.

The decision in this case is not in conflict with the decision of the first circuit construing Sec. 1(8) of the Bankruptcy Act.

Under their topic V, pages 32 to 37 of petitioner's brief, they seek to show conflict with the case of *Pope & Cottle Co.* v. *Fairbanks Realty Trust,* 124 Fed. (2d) 132. They apparently base their argument on the definition given in that case, 124 Fed. (2d), 134, where it is said that generally organizations held subject to involuntary bankruptcy in this category have been "unincorporated associations of persons joining together at least in part for some common business or commercial purpose and conducting their affairs somewhat after the pattern of corporations." From this petitioners conclude that there is no corporation within the meaning of the Act here, because they say that after the corporation was dissolved "the former shareholders in no way united or associated themselves with Peer to form a group or

an entity." (Pet. Br., p. 30) Petitioners arrive at their conclusion of law by a misstatement of the facts. The parties did associate themselves together to form a group or entity after the dissolution. We contend that it was not required that such an association must be fully and completely expressed in writing, but that it is enough if the acts of the parties showed such an association, and further the parties did conduct their affairs somewhat *after the pattern of corporations,* and hence come squarely within the general definition given by the first Circuit Court of Appeals in the *Pope* case, quoted by petitioners. The case is distinguishable on the facts as found by the Circuit Court of Appeals in this case. We have heretofore pointed out the fallacy of petitioner's contention reiterated on page 31 that the finding of the District Court was conclusive on the Court of Appeals and the argument need not here be repeated. We shall demonstrate under our next topic heading that the parties herein involved did bring themselves within the definition laid down by the first Circuit Court of Appeals in the *Pope* case cited by petitioners.

VI.

The Peer Manor Building Corporation is an unincorporated company which constitutes a corporation within the meaning of the Bankruptcy Act, and hence is subject to the jurisdiction of the bankruptcy court on a proper petition under the provisions of Chapter X of that act.

We have hereinabove quoted Section 106, Chapter X, Title 11, Section 50, U.S.C.A., and Chapter 1, Section 1 (8), Title 11, Section 1 (8), U.S.C.A., which sets up the definition of a corporation for purposes of bank-

ruptcy reorganization. The question here is whether there is disclosed by the record such unincorporated company or association as comes within the purview of that statute. For this purpose we are accepting the opinion of the Circuit Court of Appeals in the prior case, wherein it was stated that two years from the date that the corporate charter of the Peer Manor Building Corporation was revoked (June 18, 1934) the corporate entity ceased to exist for all purposes under the law of Illinois.

A corporation whether *de facto* or *de jure* can only act through natural persons. The corporation when a legal entity chartered by the State of Illinois had acted through its agents, principally J. Marshall Peer, who was at first President and later Secretary and Director (Tr. 29-30). It did not cease to operate, it did not liquidate its assets, it did not do any other act recognizing the revocation of the charter at the time of the court's decree dissolving it. Instead, the business continued in the same manner, under the same name and by direction of the same agent (Tr. 29-63).

At the time the two years allowed by Illinois law for the winding up of the corporate affairs expired the property of the corporation was in the hands of the Indenture Trustee for default on the first mortgage (Tr. 30). The possession of the property was regained by the Federal court proceedings instituted by McHugh and Peer petitioning in the name of Peer Manor Building Corporation, representing it to be a corporation, and representing that the petition was authorized by a corporate Board of Directors (Tr. 55) (See Pet. Ex. 1, pp. 2-4). The court ordered the debtor restored to possession. Peer came forward and acted in the name of

a corporate debtor in possession (Tr. 30) (Pet. Ex. 1, p. 5). The same Peer who now challenges these proceedings as one of the petitioners herein then robed himself in a corporate cloak and styled himself corporate officer and corporate agent, exercised powers of a corporation, in corporate name, form and style. Whether the court had jurisdiction or not, and whether there was a legal entity or not, Peer and McHugh associated themselves together, acted in concert, exercised the powers of a corporation, acted in the corporate name and conducted affairs after the pattern of corporation. They did this in initiating the proceedings as shown by the petition (Pet. Ex. 1, pp. 2-4) on July 23, 1936, and McHugh then swore to the petition which stated that the Directors had met and authorized its filing. On November 28, 1936, McHugh and Peer acted together in association in the corporate name, and by corporate pattern when they executed an extension agreement as corporate officers, as well as interest coupons likewise executed (Pet. Ex. 11, Tr. 53). They again acted together in a corporate pattern on April 27, 1937 when they executed and attested a trust agreement in the corporate name and style (Pet. Ex. 5, Tr. 32-39). They acted in the same manner again on August 6, 1940 when they executed a chattel mortgage note and a chattel mortgage (Tr. 45-51). They on August 10, 1940 appeared before a Notary Public and acknowledged a chattel mortgage as corporate officers. It would seem that more ample evidence would not be necessary to sustain the finding of the Court of Appeals that there was being conducted an unincorporated company, at least by Peer and McHugh, but there is other evidence in the record. It is not a sufficient answer to say that several of the documents were executed pursuant to

order of the District Court, and in consummation of a plan approved by it. The petition filed in the court was not executed by any order of the court, nor was the chattel mortgage and the chattel mortgage note, but in any event the orders of the District Court, which approved the execution of some of these documents were all entered, and the plan itself was approved in a proceeding in which this same unincorporated company, acting through McHugh and Peer, were the moving parties. These court orders did not impose tasks on the debtor or its officers. The orders merely granted their requests.

This unincorporated company hired counsel to represent it and counsel acted. We find Carey, the lawyer, in August, 1937 and again in December, 1937 acting not in the name of Peer as a stockholder, or co-owner, as he now contends, but acting in the name of Peer Manor Building Corporation (Pet. Exs. 2, 3, Tr. 59-60). This attorney appeared in the name of the company and acted for it in 1936 and up until the controversy developed on the expiration of the extension agreement (Tr. 61). The same attorneys appeared and filed a petition in the court in the name of Peer Manor Building Corporation December 27, 1941 (Pet. Ex. 1, pp. 32-33) and again on December 29, 1941 (Pet. Ex 1, pp. 33-34).

The company made no change in its method of operating up to the time of the filing of this petition. It is true that on several occasions receivers and trustees intervened by direction of the courts, but they did not change the company structure. The conduct of this business as a company was lastly interrupted by the receiver appointed in December, 1941, and then the trustee in 1942 who continued in possession of the property up to the filing of the petition herein. True the trustee has

been held to be there on orders of a court without jurisdiction. This might be demonstrative of this status but would have no bearing on the character of the business as an unincorporated company.

Mr. Daniel J. McCarthy, attorney, appeared in the District Court for this company on June 13, 1942 (Pet. Ex. 1, p. 47). Peer continuously acted in the same manner in conducting the affairs of the unincorporated company as he had acted in conducting the affairs of the incorporated company up to the time the court assumed jurisdiction in December, 1941. He said he did not find out that the charter was revoked until the summer of 1941 (Tr. 55). He said that so far as he knew no one in connection with the company knew that the charter was revoked (Tr. 30). When Peer did learn about the revocation of the charter he continued to operate the business the same way (Tr. 54-55). When asked to identify his signature to the petition filed in the District Court, he said "What other name should I sign? It was still Peer Manor Building Corporation, not incorporated." (Tr. 55.) The only fair inference from this is, that it was considered by the parties who were responsible for the transactions as an unincorporated company.

The foregoing, we believe, establishes clearly that Peer and McHugh acted together in association in the manner and form of a corporation in conducting the business over a period of years lapsing between the revocation of the old charter and the institution of this proceeding. Whether or not we have included in our petition in this case parties that were not in the association is a matter that would be determined on hearing in the District Court, and does not go to the jurisdiction of the court to hear the cause so long as we have

established that some of the parties charged did act in concert and did constitute an unincorporated company. However, the concerted action is not limited to Peer and McHugh. On April 27, 1937 a trust agreement was entered into in the name of this company (Tr. 32-39). This agreement provided for the delivery of all the stock of the Peer Manor Building Corporation to the trustee thereunder; it provided for the voting of the stock by the stockholders, except in case of default; for the election of Directors; it imposed restrictions on the Directors and stockholders against changing the capital structure or encumbering or disposing of substantially all the assets (Tr. 36-37); it provided for the management by the trustee of such affairs as paying expenses of litigation, taxes, interest and administering a sinking fund to retire the indebtedness (Tr. 37); it provided that it was to continue in effect until all first mortgage bonds should be retired and interest paid, and the trust deed released of record (Tr. 39). Petitioner's Exhibit 1, page 15 shows that the holders of 703 shares of the capital stock out of 903 shares issued had deposited their stock under this agreement up to August 27, 1937, and, that among those who deposited, there appeared to have been J. Marshall Peer depositing 186 shares and James McHugh depositing 172 shares. It was alleged in a request for admissions in that case that all of the stockholders had deposited prior to the filing of that request, June 13, 1942 (Pet. Ex. 1, pp. 35, 37). That allegation was admitted by petitioner Witter in his answer thereto (Pet. Ex. 1, p. 43). More than 75 per cent of the stockholders actively joined in the plan that was confirmed in the District Court December 2, 1936 (Pet. Ex. 1, p. 8). These depositors are the parties who are named as constituting the persons asso-

ciated together in the unincorporated company. The Heitman Trust Company, trustee, functioned under this trust agreement until the District Court assumed jurisdiction on the petition filed December 5, 1941, and received the rents as therein provided monthly (Pet. Exs. 2-3, Tr. 59-60, Pet. Exs. 6, 7, 8, Tr. 41-45, testimony of Peer, Tr. 30-31). The trust agreement by its terms provided that adherence thereto was to be evidence by deposit of the shares of the old corporation. All of these transactions showed that the parties, not only Peer and McHugh, but the other shareholders who deposited their shares had adhered to the trust agreement, ratified the petition that had been filed in the bankruptcy court by Peer and McHugh in the name of the corporation, and adhered to the plan. All these acts manifested their association, and if its evidence in writing in a single document was necessary then the trust agreement furnished that evidence.

We suggest that these transactions were voluntary transactions, since the authorizations given by the court decree, whether with or without jurisdiction, were entered at the suit of these parties, and they could not have any different construction placed on their voluntary act because the court approved them, whether with or without jurisdiction.

We further submit that since the charter had been revoked the acts of these parties resulted in an unincorporated company, and the execution of the trust agreement by Peer and McHugh, and the adherence to it by the other stockholders by their acceptance of the plan, and by the deposit of their stock under the trust agreement constitute acts of association on the part of these stockholders for the purpose of carrying on this business in the manner and in the form it was carried

on, whether the court had any jurisdiction to approve it or not. The failure of the jurisdiction would strip the transaction of judicial sanction, but would not undo the acts of the parties, nor would it change the character of those acts.

The language of the statutory definition has been interpreted in a number of cases. A leading case cited by many of the courts subsequently as authority is entitled *In re Order of Sparta,* 242 Fed. 235, C.C.A. 3. That court reviewing a bankruptcy decision construed the words "any unincorporated company." The Order of Sparta was an unincorporated fraternal association. The meaning of the words "any unincorporated company" in the bankruptcy act was directly in issue. The court pointed out that the Order of Sparta had no capital stock, that its members were not individually liable to pay either the benefit certificates or its other debts, these being payable out of the treasury.

In this case, except for the original guarantee of J. Marshall Peer, the stockholders of the old company who became participants in the unincorporated company, were not liable for the indebtedness herein involved individually. The mortgage was payable out of the property secured thereby. The Third Circuit Court of Appeals in the Sparta case said in part on page 238:

> "Whatever may be the full scope of the word 'Company', it does include at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business, or commercial corporation. A corporation is also a group of individuals, and the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the act."

We suggest that while stockhodlers of the corporation after the revocation of its charter continue to act for years in precisely the same manner, doing business in precisely the same way and in the same name, it would be indeed a strange construction that would consider it anything other than a business company without a charter.

The court in the Sparta case continued on page 239, as follows:

> "Two minor objections may be briefly noticed. The first is that the order is not a legal entity, and cannot be sued *qua order*. To this it is enough to answer that, as Congress has permitted a suit in bankruptcy to be brought against such a company, no reason is apparent why the proceeding should not bring the company into court under its own name—of course with notice to the proper officials."

The other question referred to is not herein involved. Every element used by the court as a test to determine the existence of a corporation under the statute in that case is present here.

The same language was construed by the Second Circuit Court of Appeals in the case entitled *In re Tidewater Coal Exchange,* 280 Fed. 638. In that case the court quotes with approval the decision of the Third Circuit Court of Appeals in the case *In re Order of Sparta,* which we have quoted above and says on pages 643, 644:

> "A company is defined in the Century Dictionary as 'a number of persons united for performing or carrying on anything jointly.' If such a number of persons are united for carrying on any kind of business enterprise jointly, and are not incorporated, and do not constitute a partnership, they are an 'unincorporated company' within the true intent,

> and meaning of the acts of Congress relating to bankruptcy. * * * It is not a 'corporation,' not having been incorporated at the time involved. It is not a partnership, there being no agreement to divide the profit and bear the loss. It is not a joint-stock company, for there is no stock. It is simply an unincorporated company or association engaged in the prosecution of a business enterprise, as distinguished from one which is charitable, or religious, or educational, or social. * * * It is sufficient that the Exchange is an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors, and which is neither a corporation, nor a partnership, nor a joint-stock company. It is 'an unincorporated company' within the meaning of the act, and as such can be adjudicated a bankrupt."

The Peer Manor Building Corporation as it operated after the expiration of its charter acting precisely as a corporation and in the name and style of a corporation, could not be said to be less an unincorporated company than the Tidewater Coal Exchange. There is another parallel in that case in that the members of the Exchange included corporations and partnerships, as well as individuals.

The court said on page 641:

> "The membership of the Exchange included, not only individuals, but corporations and partnerships as well."

Petitioners here complain that we have charged that the unincorporated company was made up of individuals and corporations. That was true in the Tidewater Exchange case, also as we have indicated; that did not prevent the court of bankruptcy from having jurisdic-

tion over the unincorporated company itself. Certainly this record shows that McHugh and Peer were united for performing and carrying on a business enterprise jointly, and the Court of Appeals said it was not incorporated, it contained none of the elements of a partnership, and the deposit of stock under the trust agreement, and the approval of the plan by the participants who were the former stockholders definitely shows their association in that business.

In the case entitled *In re Seaboard Fire Underwriters,* 137 Fed. 987, the District Court for the Southern District of New York held an unincorporated association of fire underwriters to be an unincorporated company, within the meaning of the act, and as such subject to be adjudicated a bankrupt, although, if it had been incorporated, it could not have been proceeded against, because corporations carrying on the business of insurance were expressly excepted from the provisions of the act.

In the case of *Gallagher* v. *Hannigan,* 5 Fed. (2d) 171, the First Circuit Court of Appeals had before it the Old Colony Foreign Exchange Company to determine its status within the meaning of the bankruptcy statute. In that case three parties had executed a trust agreement ostensibly for the purpose of carrying on different lines of business, including the purchase of foreign merchandise and exchange, and provided that title to all property acquired should be in them or their trustees or successors; provided that the sole duties of the trustees would be to hold title to the property; that directors should be elected who would have exclusive management of the business; that there should be no personal liability on the part of the trustees or the Board of Directors or the certificate holders; that the prop-

erty of the trust only be liable. This instrument was filed with the Commissioner of Corporation for Massachusetts. The company never conducted any business of the kind described in its written instrument; no certificates of ownership of units were ever issued to any parties except the three trustees; no directors were ever elected and no records of meetings were ever kept; no investment was ever made by the company and no purchases outside of office furniture were ever made. The company had done no business except to borrow money on its notes and debentures, to make payments on notes and pay commissions and attorney fees.

The court said on page 174:

> "While in fact this association was a mere sham and pretense, intended to gain the confidence of the public in order to defraud it, yet, so far as it had any status and could perform any acts, it could only do so through them, and their acts were its acts. * * * We concur with the two learned District Judges in rejecting this proposition and its results, and hold that the bankrupt was an 'unincorporated company,' within the meaning of section 4b of the Bankruptcy Act. * * *"

The proposal rejected was the contention of the defendants that the concern was a partnership.

The court continued in the opinion:

> "Undoubtedly, such associations, when fully organized as the declaration of trust in this case contemplated, are held by the Massachusetts courts to be, for certain narrowly limited purposes, partnerships. But it does not at all follow that under federal law they cannot be properly adjudicated bankrupt as unincorporated companies."

This case not only sustains our contention that this

company is an unincorporated company but answers the contention of the petitioners herein that it could not be adjudicated because of being a partnership under Illinois law. The partnership claimed is certainly a partnership for narrowly limited purposes purely by statute as was the Old Colony Foreign Exchange Company in the case we have just referred to under the Massachusetts statute. That case holds a company which exists wholly as a sham and pretense amenable to the bankruptcy statute under its definition of a corporation. It is not necessary to go that far in this case; this company actually conducted business and operated over a times as receivers or trustees, appointed by the courts, intervened and operated the property for whomever might be in interest.

In the case of *In re Poland Union,* 77 Fed. (2d) 855, the Second Circuit Court of Appeals reiterated the doctrine laid down in the *Tidewater Exchange* case, which we have cited above and there held that the Poland Union came within the definition of a corporation under the provisions of Section 77B of the Bankruptcy Act, which preceded Chapter X of the present act.

Other cases supporting this same doctrine are, *In re Booth's Drug Store,* 19 Fed. Sup. 95, D.C. W.Va.; *In re Minnesota Insurance Underwriters,* 36 Fed. (2d) 371 (D.C.); *Brooklyn Trust Company* v. *Commissioner of Internal Revenue,* 80 Fed. (2d) 865 (C.C.A. 2).

The phrase in the statute, to which we have referred, is "unincorporated companies and associations." This phrase appeared in the amendment to the Bankruptcy Act in 1926. The Revenue Act of 1926 also made "uninperiod of seven years without a charter, except for such corporated associations" liable as corporations for in-

come taxes. This and other courts have interpreted the meaning of "associations" as used in the Revenue Act by the same Congress in the same year that it was included in the Bankruptcy Act. We believe it to be a fair inference that the Congress intended to have the same meaning apply in both cases.

In the case entitled *Morrissey* v. *Commissioner of Internal Revenue,* 296 U.S. 344, 56 Sup. Ct. 289, this court said on page 295:

> "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity * * * As we have seen, the classification cannot be said to require organization under a statute, or with statutory privileges."

This court maintained the same doctrine in the cases of *Helvering* v. *Coleman-Gilbert Associates,* 296 U.S. 369; 56 Sup. Ct. 285, and *Helvering* v. *Combs, et al.,* 296 U.S. 365; 56 S. Ct. 287.

In other words this court has construed the provisions of the revenue statute, including for the purposes thereof "associations" in the term "corporations" to require something less, not something greater than an organization under the statute with statutory privileges.

In the case of *Crocker* v. *Commissioner of Internal Revenue,* 84 Fed. (2d) 64, C.C.A. 7, there was before the court a corporation that had been dissolved by the State of Illinois for some ten or twelve years before the suit was brought. The company had been incorporated for a stated period and its charter would have expired in 1912, even if it had not already been dissolved theretofore, but the business was continued under the corporate name after the charter was revoked but without

any formal corporate organization being maintained. The issue before the court was whether this business was taxable as a corporation under the Revenue Act of 1926 by reason of the fact that the Act included under the definition of corporations for tax purposes the term "associations," (Section 2-(a) (2) of the Revenue Act of 1926, C. 27, 44 Stat. 9-131). The case does not state the date of the forfeiture of the charter for failure to file statutory reports; it does state that the company was incorporated in 1892 for 20 years, and the suit was under the Revenue Act of 1926, and the court says on page 65:

> "After the forfeiture and the expiration of the charter by its terms, the utility business of the corporation was conducted in the corporate name by petitioner John Crocker, and he and his associates treated the assets and franchise as owned by them as tenants in common."

The court said further on the same page:

> "Petitioners contend that the company was not a corporation or an association taxable as a corporation, * * * Obviously, at least upon expiration of its charter, the company ceased to be a corporation *de jure,* and the state might have objected to its further exercise of corporate authority."

The court after analyzing the regulations continues and cites from Regulation 69 of the Treasury Department, the following:

> " 'A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2.' "

The court held that for the purpose of the revenue

statute this company constituted an association taxable as a "corporation."

We suggest that in the absence of any indication by the Congress to the contrary that where it uses the same term as being embraced in a statutory definition of corporations in two statutes enacted in the same year by the same Congress that it cannot be said to have meant one thing in one of those statutes and to have meant something different in the other.

Whatever may have been the ultimate right of the stockholders after the dissolution of the corporation the fact remains that there was at the time of the dissolution real property held by the corporation; that there were outstanding bonds which were secured by trust deed to this property; that the two-year period provided by the Illinois statute expired without these bond creditors having been paid; that the enterprise was kept intact; that there was no distribution of any assets to individuals as stockholders; that the business did continue to be operated as a unit and that it was operated by some of the stockholders who had been corporate officers, and that operation was concurred in and approved by other stockholders; there was here an association to reorganize.

It is a demonstration of the kind of thing which motivated the Congress to include the broad term in its definition of corporation. It was the legislative purpose to afford a method of reorganization of affairs of a company for the benefit of creditors in a situation of this kind without relegating those creditors to a multiplicity of actions in the state court to determine title to funds, necessitating the including of a large number of persons as parties in a proceeding. Such would be the result if we were to accept the conclusions of the

petitioners as to the status of this enterprise, that is, a property operated by one tenant in common and owned by a large number of tenants in common.

Conclusion.

We conclude:

1. That the issues in this case were not adjudicated by the decision of the Circuit Court of Appeals in the first case (a) because there is not here the same party respondents, (b) the holding of the Court of Appeals that an Illinois corporation whose charter had been revoked more than two years could not be adjudicated a bankrupt, because it no longer existed does not determine the status in bankruptcy of an unincorporated company conducted by the persons who were stockholders of the former entity, or some of them.

2. That on all the facts in the record the only fair conclusion is that the stockholders and officers of the old corporation after its demise operated in the manner and form of a corporation; that they conducted a business jointly after the pattern of a corporation, and under the authorities we have cited, this resulted in an unincorporated company, as well as an association, which was of the character that would come within the definition of a corporation as set out in the Bankruptcy Act.

3. The evidence shows a business conducted by a group of individuals operating for business purposes, avoiding or attempting to avoid individual liability and conducting the business with the hope of profit. Such

company is subject to the bankruptcy act as a corporation.

The judgment of the Circuit Court of Appeals for the Seventh Circuit is not in error, it is not in conflict with the decisions of any other circuit, it merely construed a statute in line with the construction that has been placed on that statute by the other courts before whom it has been in issue and in line with the decisions of this and other courts construing the same language appearing in other statutes. Hence the petition for certiorari ought to be denied.

Respectfully submitted,

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Attorney for Respondent, G. J. Nikolas, G. J. Nikolas and Company, Inc. and Harry Foote.

GEORGE E. Q. JOHNSON,
Of Counsel.

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SEP 30 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 404

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,

Debtor.

W. D. WITTER AND J. MARSHALL PEER,

Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

MEYER ABRAMS,
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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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THE "FACTS".

Respondents state (p. 2) that petitioners' statement that the 1936 Petition was filed by two of the officers of the corporation without authority from its Directors is in-

accurate because the "record shows" that it was filed by the "authorization" of the Directors. Their reference to Page 55 of the Record is merely to the statement contained in the Petition. The evidence, however, was that this statement was incorrect and that no Meeting was held authorizing the filing of the Petition (R. 30). If it be conceded, for argument (as respondents contend) that the corporation was not in possession of its business from 1933 (prior to dissolution) up to and including the appointment of the Bankruptcy Trustee in 1936 (subsequent to dissolution), then it is evident that *at no time was there an unincorporated company in esse* capable of being reorganized under Chapter X, since the *alleged* "unincorporated company" was *non-existent* either prior to dissolution or subsequent thereto. No matter what position respondents choose to take, the Peer Manor Building Corporation was *not* an "unincorporated" company.

THE "ARGUMENT".

I.

Former Adjudication.

The contention (p. 4) that "*res adjudicata* or *estoppel by judgment*" required "two indispensable elements: (1) Identity of parties" and (2) "Identity of issues", is founded on a *confusion* of the term "*res adjudicata*" with the term "*estoppel by judgment.*" The latter requires the identity of issues, while the former does *not* require the identity of issues. This was pointed out in the Petition (p. 21). The distinction clearly appears in two recent decisions decided by the Illinois Supreme Court. In *Espadron* v. *Davis*, 385 Ill. 304, the Court pointed out the "*wide difference*" between "*res adjudicata*" and "*estoppel by judgment*", and that the former is "conclusive" not only as to every matter which was offered to sustain or defeat the claim or demand but as to any other matter which might have been offered for that purpose, while the latter is confined to the "issue" which was presented to the Court. This was reiterated in *Normal State Bank* v. *Killian*, 386 Ill. 449, 456. In the case at bar the action was between the *same parties* based on the *same claim or demand*, being the bonds secured by the Trust Indenture. The same property is involved. The same debtor is sought to be rehabilitated. The defense of *res adjudicata* was, therefore, a complete bar to the second Petition, as held by the District Court, and the Circuit Court of Appeals clearly erred in reversing the lower Court and its decision is in *conflict* with the Illinois Law.

Respondents, who complain of inconsistency at page 24 of their Answer to Petition 405-6 should have at least been

consistent themselves and not blow hot and cold at the same time. They do so when they say in one breath (p. 5) that the decision on the former appeal, that the debtor could not be reorganized under Chapter X was on the ground that the Peer Manor Building Corporation "was no entity" which could be proceeded against under the Illinois law, and when they say in the next breath (p. 12) that absence of "an entity" under Illinois law is no obstacle to Federal proceedings in Bankruptcy.

In answer to the point that the respondents are the *identical parties* against whom it was adjudicated that the Peer Manor Building Corporation could not be reorganized a corporation, respondents say (p. 5) "Granted that we have some of them, this is not enough." They do not say who are some of the other parties. A reference to their First Petition and to the Second Petition discloses that *the parties are identical.* Only by a resort to a *confusion* of the defense of *res adjudicata* with that of *estoppel by judgment,* do they argue that the former adjudication is no bar to this action.

Their illustration (p. 5) of a suit of "Jones v. Smith" with a suit of "Jones v. Robinson" is not in point because there, "Smith" and "Robinson" are *different* persons, while here, the property which was sought to be reorganized, the Peer Manor Building Corporation, is *identical.* This was not a suit in *personam* to hold "Smith" liable on a "note" and later to hold "Robinson" liable on the note executed by "Smith", as argued by counsel, but was a suit to reorganize the identical property secured by the same bond issue upon which neither the Peer Manor Building Corporation, as a corporation, nor as an unincorporated company, was liable, since the bonds were executed by Peer, individually. It was a proceeding to reorganize the *res* which *res* was involved in both proceedings. The

same nonexistent entity is sought to be rehabilitated. The parties were identical, the property was identical, and the relief was identical.

Respondents *concede* (p. 7) that they asked for the identical relief in their Petition for Rehearing on the former appeal, which was denied. The identical issue was, therefore, decided on the former appeal, and this was a complete bar to the new action, as held by the District Court. It was the duty of the Court of Appeals to sustain the judgment.

II.

Rule 52 Is Applicable in Bankruptcy.

In answer to petitioners' argument that the findings of the District Court which heard the witnesses were binding and conclusive on the Court of Appeals on the point that the Peer Manor Building Corporation was not an unincorporated company, respondents claim (p. 5) that Rule 52 is inapplicable to Bankruptcy. *The contrary was held by this Court* in *Kelly* v. *Everglade,* 319 U. S. 415. See also, *Perry* v. *Bauman,* 122 F. (2d) 409, which is *decisive* on this issue.

III.

The Individual Liability Is Determinative of the Jurisdiction.

Respondents contend (pp. 8-9) that even if the members of the alleged unincorporated company are individually liable as partners, such a company may still be reorganized under Chapter X pursuant to § 1(8). This runs counter to the provision of the section which *limits* associations to cases where "the capital subscribed" is "*alone*" responsible for the debts of the association. Because of

this expressed provision of the Statute, their argument (p. 9) that Congress, by enacting the Statute, had set up its own definition of a corporation, is devoid of merit for the reason that *it excluded associations whose members are individually liable* under State law.

IV.

The Debtor Status as an Entity Is in Issue.

The contention (p. 10) that the status of the Peer Manor Building Corporation as an entity is not an issue is completely without any basis. In view of the statutory provision that a partnership or association must be one where the capital stock limits the obligation of the members, it is evident that Congress referred to a legal entity and *not* to an association which under the local law is not an entity and whose members are held individually liable. The same reasoning which prompted the Seventh Circuit to reverse the decree reorganizing the debtor because it was not a legal entity, is applicable to the same company as an alleged unincorporated company which, under the State law, is not a legal entity.

Chapter X contemplates the rehabilitation of an entity. If the entity has no recognition under State law then there is no subject matter for reorganization under Chapter X.

We have shown in our petition that under the Illinois law there existed at most a partnership with individual liability and that consequently there was neither a corporation, association or unincorporated company, where the members thereof limited their liability.

That the Federal courts will follow the local law as to what constitutes an entity is decided by the cases cited in our petition.

V.

The Conflict in the Decisions.

The question whether there is a conflict between the decisions in the instant case (143 F. (2d) 769) and the decision of the First Circuit (124 F. (2d) 132) as urged in the Petition (pp. 32-37), which is denied by the respondents, can best be answered by a reading of the two decisions. With all their ingenuity, they cannot reconcile the two decisions in construing Section 1 (8) of the Bankruptcy Act.

VI.

The Peer Manor Building Company Is Not an Unincorporated Company.

The argument of the respondents (pp. 14, 15) to convince the Court that the Peer Manor Building Company is an unincorporated company, tends to show that two of its officers conducted the business as *a corporation* and *not* as an unincorporated company. On the factual issues, the findings of the District Court were conclusive under Rule 52, as held by this Court in *Kelly* v. *Everglade, supra.*

The "Conclusion."

The "conclusion" of the respondents' is unsupported by any of the authorities. The District Court was correct in its judgment that the decision on the former appeal, between the same parties involving the same subject matter and seeking the identical relief, was a complete bar to the second Petition. The decision of the Circuit Court of Appeals reversing the order below was in conflict with the decisions of this Court and with the decisions of other

Circuits, and, therefore, the Writ of Certiorari should be issued.

Respectfully submitted,

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